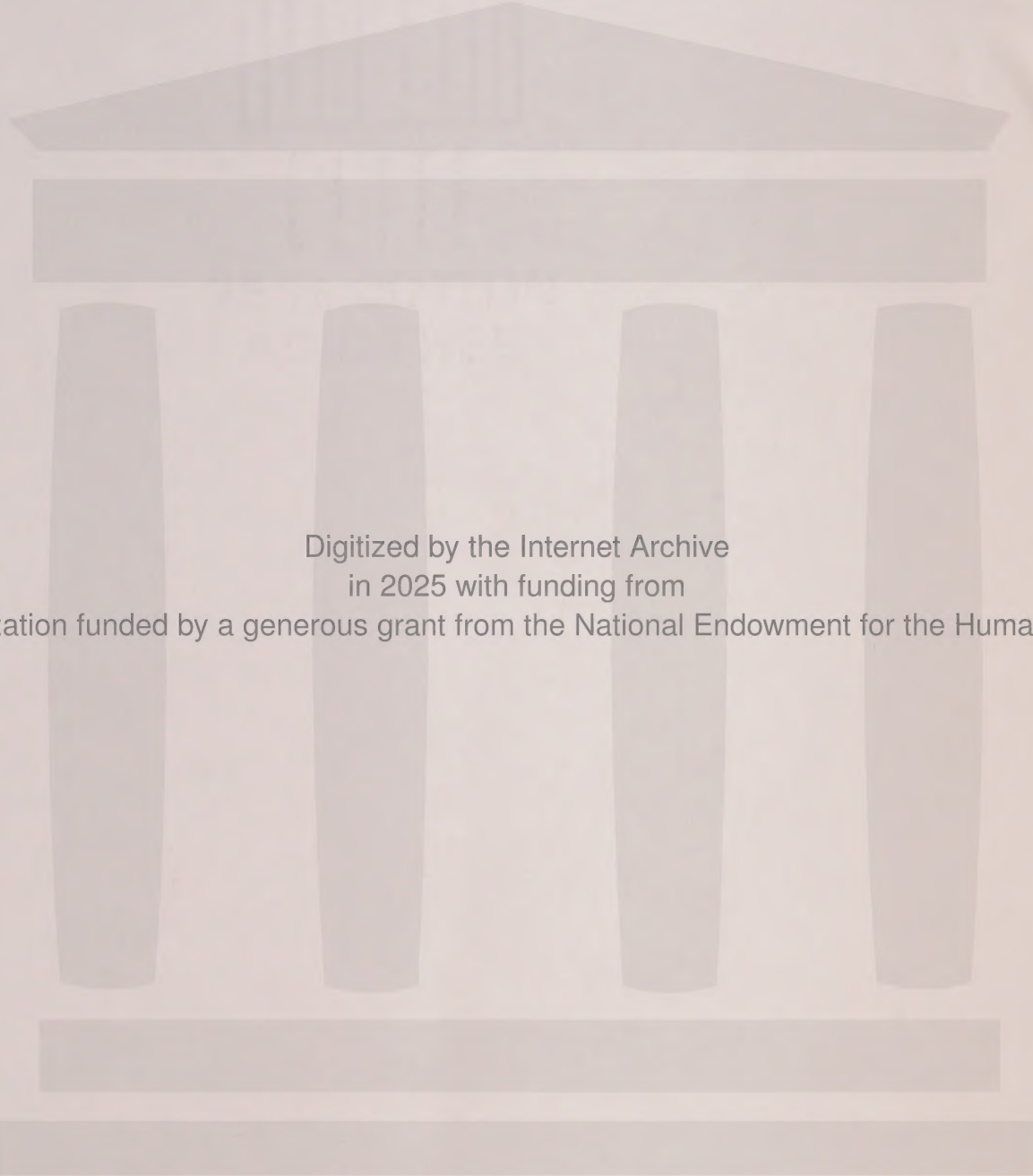


Special Verdict
Forms

JA 371



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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS HOBSON, et al.,
Plaintiffs,

v.

JERRY WILSON, et al.,
Defendants.

Civil Action No. 76-1326

FILED

DEC 20 1981

SPECIAL VERDICT FORM

1. Did any of the following defendants injure plaintiff Tina Hobson in the exercise of that plaintiff's First Amendment rights or participate in one or more conspiracies that so injured plaintiff Tina Hobson?

	Name of Defendant	By claimed Individual Action		By claimed F.B.I. Conspiracy		By claimed M.P.D. Conspiracy		By claimed Joint Conspiracy	
		Yes	No	Yes	No	Yes	No	Yes	No
FBI	Brennan	yes		yes				yes	
	Moore	yes		yes				yes	
	Jones	yes		yes				yes	
	Grimaldi	yes		yes				yes	
	Pangburn	yes		yes				yes	
	Wilson	yes				yes		yes	
D.C.	Herlihy	yes				yes		yes	
	Acree		No				No		No
	Bynum		No				No		No
	Scraper		No				No		No
	Jagen		No				No		No
	Suter		No				No		No
	Mahaney		No				No		No
	Kolego-Markovich		No				No		No
	District of Col.*	yes				yes		yes	

If your answer is "no" to all of the foregoing questions, you should proceed no further; your "no" answers constitute a verdict for defendants. If your answer to any of these questions is "yes," proceed to the next page.

* If you find the District of Columbia liable for the acts of employees, mark the space opposite the District of Columbia entry under "By alleged individual action."

Tina H. 11/3/60

2. Were any of the following defendants immune from responsibility as found in no. 1 above?

		<u>Name of Defendant</u>	<u>Immune</u>	<u>Not Immune</u>
FBI		Brennen		✓
		Moore		✓
		Jones		✓
		Grimaldi		✓
		Pangburn		✓
		Wilson		✓
D.C.		Herlihy		✓
		Acree	✓	
		Bynum	✓	
		Scrapper	✓	
		Jagen	✓	
		Suter	✓	
		Mahaney	✓	
		Kolego-Markovich	✓	

Your "immune" answers constitute a verdict for each defendant whom you have found to be immune. If you answered "immune" to all of the foregoing questions in no. 2, you should proceed no further, unless you found the District of Columbia liable in question no. 1. If you have answered any of the foregoing questions in no. 2 "not immune," or found the District of Columbia liable in question no. 1, proceed to the next page.

TINA HOBSON

3. Was the liability of any defendant about whom you answered "yes" to question no. 1 and as to which you answered "not immune" to question no. 2 barred by the Statute of Limitations?

	Name of Defendant	Claims Barred	Claims Not Barred
FBI	Brennen		✓
	Moore		✓
	Jones		✓
	Grimaldi		✓
	Pangburn		✓
	Wilson		✓
D.C.	Herlihy		✓
	Acree	✓	
	Bynum	✓	
	Scraper	✓	
	Jagen	✓	
	Suter	✓	
	Mahaney	✓	
	Kolego-Markovich	✓	

3a. If you found the District of Columbia liable in question no. 1, was that liability barred by the Statute of Limitations?

Claims barred ☐ Claims not barred ☒

(mark one of the above boxes only if liability has been found in question no. 1).

Your answer of "claims barred" in the questions above constitutes a verdict on those claims for each defendant so identified. If you answered "claims not barred" with respect to any defendant, you should proceed to the next page.

TINA ROOSE

4. If, with respect to claims against a defendant, you have answered "yes" to question no. 1, "not immune" to question no. 2, and "claims not barred" to question no. 3, you should enter opposite the name of that defendant as your verdict the amount of compensatory damages (if any) you find to be required fairly and reasonably to compensate plaintiff the amount of punitive damages (if any), and/or the amount of nominal damages (if any) to which you find plaintiff TINA ROOSE is entitled.

FBI

D.C.

<u>Name of Defen-</u> <u>dant</u>	<u>Amount of</u> <u>Damages</u> <u>Compensatory*</u>	<u>Amount of</u> <u>Damages</u> <u>Nominal*</u>	<u>Amount of</u> <u>Damages</u> <u>Punitive</u>	<u>Total</u> <u>Damages</u>
Brennen	6250.00		3125.00	9375.00
Moore	5000.00		2500.00	7500.00
Jones	3750.00		1875.00	5625.00
Grimaldi	3125.00		1562.50	4687.50
Pangburn	3750.00		1875.00	5625.00
Wilson	3750.00		1875.00	5625.00
Herlihy	3125.00		1562.50	4687.50
Acree	0		0	0
Bynum	0		0	0
Scraper	0		0	0
Jagen	0		0	0
Suter	0		0	0
Mahaney	0		0	0
Kolego- Markovich	0		0	0
Dist. of Col.	37937.50		0	37,937.50

Walter H. Water
FOREPERSON

*Note: You cannot award both compensatory damages and nominal damages.

REGINALD BOOKER

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS HOBSON, et al.,
Plaintiffs,

v.

JERRY WILSON, et al.,
Defendants.

Civil Action No. 76-1326

FILED

DEC 20 1981

SPECIAL VERDICT FORM

1. Did any of the following defendants injure plaintiff REGINALD BOOKER in the exercise of that plaintiff's First Amendment rights or participate in one or more conspiracies that so injured plaintiff REGINALD BOOKER?

	Name of Defendant	By claimed Individual Action		By claimed F.B.I. Conspiracy		By claimed M.P.D. Conspiracy		By claimed Joint Conspiracy	
		Yes	No	Yes	No	Yes	No	Yes	No
FBI	Brennan	yes		yes				yes	
	Moore	yes		yes				yes	
	Jones	yes		yes				yes	
	Grimaldi	yes		yes					No
	Pangburn	yes		yes				yes	
D.C.	Wilson	yes				yes		yes	
	Herlihy	yes				yes		yes	
	Acree		No				No		No
	Bynum	yes				yes			No
	Scraper		No				No		No
	Jagen		No				No		No
	Suter		No				No		No
	Mahaney		No				No		No
	Kolego-Markovich	yes					No		No
	District of Col.*	yes				yes		yes	

If your answer is "no" to all of the foregoing questions, you should proceed no further; your "no" answers constitute a verdict for defendants. If your answer to any of these questions is "yes," proceed to the next page.

* If you find the District of Columbia liable for the acts of employees, mark the space opposite the District of Columbia entry under "By alleged individual action."

REINARD BOOKEN

2. Were any of the following defendants immune from responsibility as found in no. 1 above?

	<u>Name of Defendant</u>	<u>Immune</u>	<u>Not Immune</u>
FBI	Brennen		✓
	Moore		✓
	Jones		✓
	Grimaldi		✓
	Pangburn		✓
D.C.	Wilson		✓
	Herlihy		✓
	Acree	✓	
	Bynum	✓	
	Scraper	✓	
	Jagen	✓	
	Suter	✓	
	Mahaney	✓	
	Kolego-Markovich	✓	

Your "immune" answers constitute a verdict for each defendant whom you have found to be immune. If you answered "immune" to all of the foregoing questions in no. 2, you should proceed no further, unless you found the District of Columbia liable in question no. 1. If you have answered any of the foregoing questions in no. 2 "not immune," or found the District of Columbia liable in question no. 1, proceed to the next page.

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3. Was the liability of any defendant about whom you answered "yes" to question no. 1 and as to which you answered "not immune" to question no. 2 barred by the Statute of Limitations?

	Name of Defendant	Claims Barred	Claims Not Barred
FBI	Brennen		✓
	Moore		✓
	Jones		✓
	Grimaldi		✓
	Pangburn		✓
	Wilson		✓
D.C.	Herlihy		✓
	Acree	✓	
	Bynum	✓	
	Scraper	✓	
	Jagen	✓	
	Suter	✓	
	Mahaney	✓	
	Kolego-Markovich	✓	

3a. If you found the District of Columbia liable in question no. 1, was that liability barred by the Statute of Limitations?

Claims barred ☐ Claims not barred ☒

(mark one of the above boxes only if liability has been found in question no. 1).

Your answer of "claims barred" in the questions above constitutes a verdict on those claims for each defendant so identified. If you answered "claims not barred" with respect to any defendant, you should proceed to the next page.

REGINALD BOOGER

4. If, with respect to claims against a defendant, you have answered "yes" to question no. 1, "not immune" to question no. 2, and "claims not barred" to question no. 3, you should enter opposite the name of that defendant as your verdict the amount of compensatory damages (if any) you find to be required fairly and reasonably to compensate plaintiff the amount of punitive damages (if any), and/or the amount of nominal damages (if any) to which you find plaintiff REGINALD BOOGER is entitled.

	Name of Defendant	Amount of Damages Compensatory*	Amount of Damages Nominal*	Amount of Damages Punitive	Total Damages
FBI	Brennen	6250.00		3125.00	9375.00
	Moore	5000.00		2500.00	7500.00
	Jones	3750.00		1875.00	5625.00
	Grimaldi	3125.00		1562.50	4687.50
	Pangburn	3750.00		1875.00	5625.00
D.C.	Wilson	3750.00		1875.00	5625.00
	Herlihy	3125.00		1562.50	4687.50
	Acree	0		0	0
	Bynum	0		0	0
	Scraper	0		0	0
	Jagen	0		0	0
	Suter	0		0	0
	Mahaney	0		0	0
	Kolego-Markovich	0		0	0
	Dist. of Col.	37,937.50		0	37,937.50

Walter H. Waters
FOREPERSON

*Note: You cannot award both compensatory damages and nominal damages.

Da D EATON

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS HOBSON, et al.,
Plaintiffs,

v.

JERRY WILSON, et al.,
Defendants.

Civil Action No. 76-1326

FILED

DEC 23 1981

SPECIAL VERDICT FORM

1. Did any of the following defendants injure
plaintiff DAVID EATON

JAMES F. DAVEY, CLERK
in the exercise

of that plaintiff's First Amendment rights or participate in one
or more conspiracies that so injured plaintiff DAVID EATON

	Name of Defen- dant	By claimed Individual Action		By claimed F.B.I. Conspiracy		By claimed M.P.D. Conspiracy		By claimed Joint Conspiracy	
		Yes	No	Yes	No	Yes	No	Yes	No
FBI	Brennan	YES		YES				YES	
	Moore	YES		YES				YES	
	Jones	YES		YES				YES	
	Grimaldi	YES		YES					NO
	Pangburn	YES		YES				YES	
D.C.	Wilson	YES				YES		YES	
	Herlihy	YES				YES		YES	
	Acree		NO				NO		NO
	Bynum	YES				YES			NO
	Scraper		NO				NO		NO
	Jagen		NO				NO		NO
	Suter		NO				NO		NO
	Mahaney		NO				NO		NO
	Kolego- Markovich		NO				NO		NO
	District of Col.*	YES				YES		YES	

If your answer is "no" to all of the foregoing
questions, you should proceed no further; your "no" answers
constitute a verdict for defendants. If your answer to any of
these questions is "yes," proceed to the next page.

* If you find the District of Columbia liable for the acts of
employees, mark the space opposite the District of Columbia entry
under "By alleged individual action."

DAVID EATON

2. Were any of the following defendants immune from responsibility as found in no. 1 above?

	<u>Name of Defendant</u>	<u>Immune</u>	<u>Not Immune</u>
FBI	Brennen		✓
	Moore		✓
	Jones		✓
	Grimaldi		✓
	Pangburn		✓
	Wilson		✓
D.C.	Herlihy		✓
	Acree	✓	
	Bynum	✓	
	Scraper	✓	
	Jagen	✓	
	Suter	✓	
	Mahaney	✓	
	Kolego-Markovich	✓	

Your "immune" answers constitute a verdict for each defendant whom you have found to be immune. If you answered "immune" to all of the foregoing questions in no. 2, you should proceed no further, unless you found the District of Columbia liable in question no. 1. If you have answered any of the foregoing questions in no. 2 "not immune," or found the District of Columbia liable in question no. 1, proceed to the next page.



DAVID EATON

3. Was the liability of any defendant about whom you answered "yes" to question no. 1 and as to which you answered "not immune" to question no. 2 barred by the Statute of Limitations?

	<u>Name of Defendant</u>	<u>Claims Barred</u>	<u>Claims Not Barred</u>
FBI	Brennen		✓
	Moore		✓
	Jones		✓
	Grimaldi		✓
	Pangburn		✓
D.C.	Wilson		✓
	Herlihy		✓
	Acree	✓	
	Bynum	✓	
	Scrapper	✓	
	Jagen	✓	
	Suter	✓	
	Mahaney	✓	
	Kolego-Markovich	✓	

3a. If you found the District of Columbia liable in question no. 1, was that liability barred by the Statute of Limitations?

Claims barred ☐ Claims not barred ☒

(mark one of the above boxes only if liability has been found in question no. 1).

Your answer of "claims barred" in the questions above constitutes a verdict on those claims for each defendant so identified. If you answered "claims not barred" with respect to any defendant, you should proceed to the next page.

David Eaton

4. If, with respect to claims against a defendant, you have answered "yes" to question no. 1, "not immune" to question no. 2, and "claims not barred" to question no. 3, you should enter opposite the name of that defendant as your verdict the amount of compensatory damages (if any) you find to be required fairly and reasonably to compensate plaintiff the amount of punitive damages (if any), and/or the amount of nominal damages (if any) to which you find plaintiff David Eaton is entitled.

	Name of Defendant	Amount of Damages Compensatory*	Amount of Damages Nominal*	Amount of Damages Punitive	Total Damages
FBI	Brennen	6250.00		3125.00	9375.00
	Moore	5000.00		2500.00	7500.00
	Jones	3750.00		1875.00	5625.00
	Grimaldi	3125.00		1562.50	4687.50
	Pangburn	3750.00		1875.00	5625.00
D.C.	Wilson	3750.00		1875.00	5625.00
	Herlihy	3125.00		1562.50	4687.50
	Acree	0	0	0	0
	Bynum	0	0	0	0
	Scrapper	0	0	0	0
	Jagen	0	0	0	0
	Suter	0	0	0	0
	Mahaney	0	0	0	0
	Kolego-Markovich	0	0	0	0
	Dist. of Col.	37,937.50	0	0	37,937.50

Walter H. Watson
FOREPERSON

*Note: You cannot award both compensatory damages and nominal damages.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIAJULIUS HOBSON, et al.,
Plaintiffs,

v.

JERRY WILSON, et al.,
Defendants.

Civil Action No. 76-1326

FILED

DEC 23 1981

SPECIAL VERDICT FORM

1. Did any of the following defendants injure JAMES E. DAVEY, CLERK
 plaintiff Arthur Waskow in the exercise
 of that plaintiff's First Amendment rights or participate in one
 or more conspiracies that so injured plaintiff Arthur Waskow?

Name of Defen- dant	By claimed Individual Action		By claimed F.B.I. Conspiracy		By claimed M.P.D. Conspiracy		By claimed Joint Conspiracy	
	Yes	No	Yes	No	Yes	No	Yes	No
Brennan	Yes		Yes				Yes	
Moore	Yes		Yes				Yes	
Jones	Yes		Yes				Yes	
Grimaldi	Yes		Yes				Yes	
Pangburn	Yes		Yes				Yes	
Wilson	Yes				Yes		Yes	
Herlihy	Yes				Yes		Yes	
Acree		No			Yes			No
Bynum		No				No		No
Scrapper	Yes				Yes		Yes	
Jagen	Yes				Yes			No
Suter	Yes				Yes		Yes	
Mahaney	Yes				Yes		Yes	
Kolego- Markovich	Yes				Yes			No
District of Col.*	Yes				Yes		Yes	

If your answer is "no" to all of the foregoing
 questions, you should proceed no further; your "no" answers
 constitute a verdict for defendants. If your answer to any of
 these questions is "yes," proceed to the next page.

* If you find the District of Columbia liable for the acts of
 employees, mark the space opposite the District of Columbia entry
 under "By alleged individual action."

2. Were any of the following defendants immune from responsibility as found in no. 1 above?

	<u>Name of Defendant</u>	<u>Immune</u>	<u>Not Immune</u>
FBI	Brennan		✓
	Moore		✓
	Jones		✓
	Grimaldi		✓
	Pangburn		✓
D.C.	Wilson		✓
	Herlihy		✓
	Acree		✓
	Bynum	✓	
	Scraper		✓
	Jagen		✓
	Suter		✓
	Mahaney		✓
	Kolego-Markovich	✓	

Your "immune" answers constitute a verdict for each defendant whom you have found to be immune. If you answered "immune" to all of the foregoing questions in no. 2, you should proceed no further, unless you found the District of Columbia liable in question no. 1. If you have answered any of the foregoing questions in no. 2 "not immune," or found the District of Columbia liable in question no. 1, proceed to the next page.

3. Was the liability of any defendant about whom you answered "yes" to question no. 1 and as to which you answered "not immune" to question no. 2 barred by the Statute of Limitations?

	Name of Defendant	Claims Barred	Claims Not Barred
FBI	Brennan		✓
	Moore		✓
	Jones		✓
	Grimaldi		✓
	Pangburn		✓
D.C.	Wilson		✓
	Herlihy		✓
	Acree		✓
	Bynum	✓	
	Scraper		✓
	Jagen		✓
	Suter		✓
	Mahaney		✓
	Kolego-Markovich	✓	

3a. If you found the District of Columbia liable in question no. 1, was that liability barred by the Statute of Limitations?

Claims barred ☐ Claims not barred ☒

(mark one of the above boxes only if liability has been found in question no. 1).

Your answer of "claims barred" in the questions above constitutes a verdict on those claims for each defendant so identified. If you answered "claims not barred" with respect to any defendant, you should proceed to the next page.

4. If, with respect to claims against a defendant, you have answered "yes" to question no. 1, "not immune" to question no. 2, and "claims not barred" to question no. 3, you should enter opposite the name of that defendant as your verdict the amount of compensatory damages (if any) you find to be required fairly and reasonably to compensate plaintiff Arthur Waskow the amount of punitive damages (if any), and/or the amount of nominal damages (if any) to which you find plaintiff Arthur Waskow is entitled.

Name of Defendant	Amount of Damages Compensatory*	Amount of Damages Nominal*	Amount of Damages Punitive	Total Damages
Brennan	6250.00		3125.00	9375.00
Moore	5000.00		2500.00	7500.00
Jones	3750.00		1875.00	5625.00
Grimaldi	3125.00		1562.50	4687.00
Pangburn	3750.00		1875.00	5625.00
Wilson	3750.00		1875.00	5625.00
Herlihy	3125.00		1562.50	4687.50
Acree	2562.50		0	2562.50
Bynum	0		0	0
Scraper	3125.00		0	3125.00
Jagen	2562.50		0	2562.50
Suter	2562.50		0	2562.50
Mahaney	1875.00		0	1875.00
Kolego-Markovich	0		0	0
Dist. of Col.	37,937.50		0	37,937.50

Sheldon H. Watson
FOREPERSON

*Note: You cannot award both compensatory damages and nominal damages.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIAJULIUS HOBSON, et al.,
Plaintiffs,

v.

JERRY WILSON, et al.,
Defendants.

Civil Action No. 76-1326

FILED

DEC 23 1981

SPECIAL VERDICT FORM

1. Did any of the following defendants injure

JAMES E. DAVEY, CLERK

plaintiff Abe Bloom in the exercise
of that plaintiff's First Amendment rights or participate in one
or more conspiracies that so injured plaintiff Abe Bloom?

Name of Defen- dant	By claimed Individual Action		By claimed F.B.I. Conspiracy		By claimed M.P.D. Conspiracy		By claimed Joint Conspiracy	
	Yes	No	Yes	No	Yes	No	Yes	No
Brennan	yes		yes				yes	
Moore	yes		yes				yes	
Jones	yes		yes				yes	
Grimaldi	yes		yes				yes	
Pangburn	yes		yes				yes	
Wilson	yes				yes		yes	
Herlihy	yes				yes		yes	
Acree	yes				yes		yes	
Bynum	yes				yes			No
Scraper	yes				yes		yes	
Jagen	yes				yes		yes	
Suter	yes				yes		yes	
Mahaney	yes				yes			No
Kolego- Markovich	yes				yes			No
District of Col.*	yes				yes		yes	

If your answer is "no" to all of the foregoing
questions, you should proceed no further; your "no" answers
constitute a verdict for defendants. If your answer to any of
these questions is "yes," proceed to the next page.

* If you find the District of Columbia liable for the acts of
employees, mark the space opposite the District of Columbia entry
under "By alleged individual action."

2. Were any of the following defendants immune from responsibility as found in no. 1 above?

	<u>Name of Defendant</u>	<u>Immune</u>	<u>Not Immune</u>
FBI	Brennan		✓
	Moore		✓
	Jones		✓
	Grimaldi		✓
	Pangburn		✓
D.C.	Wilson		✓
	Herlihy		✓
	Acree		✓
	Bynum	✓	
	Scraper		✓
	Jagen		✓
	Suter		✓
	Mahaney		✓
	Kolego-Markovich	✓	

Your "immune" answers constitute a verdict for each defendant whom you have found to be immune. If you answered "immune" to all of the foregoing questions in no. 2, you should proceed no further, unless you found the District of Columbia liable in question no. 1. If you have answered any of the foregoing questions in no. 2 "not immune," or found the District of Columbia liable in question no. 1, proceed to the next page.

3. Was the liability of any defendant about whom you answered "yes" to question no. 1 and as to which you answered "not immune" to question no. 2 barred by the Statute of Limitations?

	Name of Defendant	Claims Barred	Claims Not Barred
FBI	Brennan		✓
	Moore		✓
	Jones		✓
	Grimaldi		✓
	Pangburn		✓
	Wilson		✓
	Herlihy		✓
	Acree		✓
	Bynum	✓	
D.C.	Scrapper		✓
	Jagen		✓
	Suter		✓
	Mahaney		✓
	Kolego-Markovich	✓	

3a. If you found the District of Columbia liable in question no. 1, was that liability barred by the Statute of Limitations?

Claims barred ☐ Claims not barred ☒

(mark one of the above boxes only if liability has been found in question no. 1).

Your answer of "claims barred" in the questions above constitutes a verdict on those claims for each defendant so identified. If you answered "claims not barred" with respect to any defendant, you should proceed to the next page.



4. If, with respect to claims against a defendant, you have answered "yes" to question no. 1, "not immune" to question no. 2, and "claims not barred" to question no. 3, you should enter opposite the name of that defendant as your verdict the amount of compensatory damages (if any) you find to be required fairly and reasonably to compensate plaintiff Abe Bloom the amount of punitive damages (if any), and/or the amount of nominal damages (if any) to which you find plaintiff Abe Bloom is entitled.

	Name of Defendant	Amount of Damages Compensatory*	Amount of Damages Nominal*	Amount of Damages Punitive	Total Damages
FBI	Brennan	6250.00		3125.00	9375.00
	Moore	5000.00		2500.00	7500.00
	Jones	3750.00		1875.00	5625.00
	Grimaldi	3125.00		1562.50	4687.50
	Pangburn	3750.00		1875.00	5625.00
D.C.	Wilson	3750.00		1875.00	5625.00
	Herlihy	3125.00		1562.50	4687.50
	Acree	2562.50		0	2562.50
	Bynum	0		0	0
	Scrapper	3125.00		0	3125.00
	Jagen	2562.50		0	2562.50
	Suter	2562.50		0	2562.50
	Mahaney	1875.00		0	1875.00
	Kolego-Markovich	0		0	0
	Dist. of Col.	37,937.50			37,937.50

Walter H. Matton
FOREPERSON

*Note: You cannot award both compensatory damages and nominal damages.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIAJULIUS HOBSON, et al.,
Plaintiffs,

v.

JERRY WILSON, et al.,
Defendants.

Civil Action No. 76-1326

FILED

DEC 23 1981

SPECIAL VERDICT FORM

1. Did any of the following defendants injure JAMES F. DAVEY, CLERK
 plaintiff Richard Pollock in the exercise
 of that plaintiff's First Amendment rights or participate in one
 or more conspiracies that so injured plaintiff Richard Pollock?

Name of Defen- dant	By claimed Individual Action		By claimed F.B.I. Conspiracy		By claimed M.P.D. Conspiracy		By claimed Joint Conspiracy	
	Yes	No	Yes	No	Yes	No	Yes	No
Brennan	Yes		Yes				Yes	
Moore	Yes		Yes				Yes	
Jones	Yes		Yes				Yes	
Grimaldi	Yes		Yes				Yes	
Pangburn	Yes		Yes				Yes	
Wilson	Yes				Yes		Yes	
Herlihy	Yes				Yes		Yes	
Acree	Yes				Yes		Yes	
Bynum		NO				NO		NO
Scrapper	Yes				Yes		Yes	
Jagen	Yes				Yes		Yes	
Suter	Yes				Yes		Yes	
Mahaney	Yes				Yes		Yes	
Kolego- Markovich	Yes				Yes			NO
District of Col.*	Yes				Yes		Yes	

If your answer is "no" to all of the foregoing
 questions, you should proceed no further; your "no" answers
 constitute a verdict for defendants. If your answer to any of
 these questions is "yes," proceed to the next page.

* If you find the District of Columbia liable for the acts of
 employees, mark the space opposite the District of Columbia entry
 under "By alleged individual action."

2. Were any of the following defendants immune from responsibility as found in no. 1 above?

		<u>Name of Defendant</u>	<u>Immune</u>	<u>Not Immune</u>
FBI		Brennan		✓
		Moore		✓
		Jones		✓
		Grimaldi		✓
		Pangburn		✓
D.C.		Wilson		✓
		Herlihy		✓
		Acree		✓
		Bynum	✓	
		Scraper		✓
		Jagen		✓
		Suter		✓
		Mahaney		✓
		Kolego-Markovich	✓	

Your "immune" answers constitute a verdict for each defendant whom you have found to be immune. If you answered "immune" to all of the foregoing questions in no. 2, you should proceed no further, unless you found the District of Columbia liable in question no. 1. If you have answered any of the foregoing questions in no. 2 "not immune," or found the District of Columbia liable in question no. 1, proceed to the next page.

3. Was the liability of any defendant about whom you answered "yes" to question no. 1 and as to which you answered "not immune" to question no. 2 barred by the Statute of Limitations?

	<u>Name of Defendant</u>	<u>Claims Barred</u>	<u>Claims Not Barred</u>
FBI	Brennen		✓
	Moore		✓
	Jones		✓
	Grimaldi		✓
	Pangburn		✓
D.C.	Wilson		✓
	Herlihy		✓
	Acree		✓
	Bynum	✓	
	Scrapper		✓
	Jagen		✓
	Suter		✓
	Mahaney		✓
	Kolego-Markovich	✓	

3a. If you found the District of Columbia liable in question no. 1, was that liability barred by the Statute of Limitations?

Claims barred ☐ Claims not barred ☒

(mark one of the above boxes only if liability has been found in question no. 1).

Your answer of "claims barred" in the questions above constitutes a verdict on those claims for each defendant so identified. If you answered "claims not barred" with respect to any defendant, you should proceed to the next page.

4. If, with respect to claims against a defendant, you have answered "yes" to question no. 1, "not immune" to question no. 2, and "claims not barred" to question no. 3, you should enter opposite the name of that defendant as your verdict the amount of compensatory damages (if any) you find to be required fairly and reasonably to compensate plaintiff Richard Pollock the amount of punitive damages (if any), and/or the amount of nominal damages (if any) to which you find plaintiff Richard Pollock is entitled.

	Name of Defen- dant	Amount of Damages Compensatory*	Amount of Damages Nominal*	Amount of Damages Punitive	Total Damages
FBI	Brennan	6250.00		3125.00	9375.00
	Moore	5000.00		2500.00	7500.00
	Jones	3750.00		1875.00	5625.00
	Grimaldi	3125.00		1562.50	4687.50
	Pangburn	3750.00		1875.00	5625.00
D.C.	Wilson	3750.00		1875.00	5625.00
	Herlihy	3125.00		1562.50	4687.50
	Acree	2562.50		0	2562.50
	Bynum	0		0	0
	Scraper	3125.00		0	3125.00
	Jagen	2562.50		0	2562.50
	Suter	2562.50		0	2562.50
	Mahaney	1875.00		0	1875.00
	Kolego- Markovich	0		0	0
	Dist. of Col.	37,937.50		0	37,937.50

Walter H. Morton
FOREPERSON

*Note: You cannot award both compensatory damages and nominal damages.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIAJULIUS HOBSON, et al.,
Plaintiffs,

v.

JERRY WILSON, et al.,
Defendants.

Civil Action No. 76-1326

FILED

DEC 23 1981

SPECIAL VERDICT FORM

JAMES E. DAVEY, CLERK

1. Did any of the following defendants injure plaintiff Washington Peace Center in the exercise of that plaintiff's First Amendment rights or participate in one or more conspiracies that so injured plaintiff Washington Peace Center?

	Name of Defendant	By claimed Individual Action		By claimed F.B.I. Conspiracy		By claimed M.P.D. Conspiracy		By claimed Joint Conspiracy	
		Yes	No	Yes	No	Yes	No	Yes	No
FBI	Brennan	yes		yes				yes	
	Moore	yes		yes				yes	
	Jones	yes		yes				yes	
	Grimaldi	yes		yes				yes	
	Pangburn	yes		yes				yes	
D.C.	Wilson	yes				yes		yes	
	Herlihy	yes				yes		yes	
	Acree	yes				yes		yes	
	Bynum	yes				yes			No
	Scraper	yes				yes		yes	
	Jagen	yes				yes			No
	Suter	yes				yes		yes	
	Mahaney	yes				yes		yes	
	Kolego-Markovich	yes				yes			No
	District of Col.*	yes				yes		yes	

If your answer is "no" to all of the foregoing questions, you should proceed no further; your "no" answers constitute a verdict for defendants. If your answer to any of these questions is "yes," proceed to the next page.

* If you find the District of Columbia liable for the acts of employees, mark the space opposite the District of Columbia entry under "By alleged individual action."

2. Were any of the following defendants immune from responsibility as found in no. 1 above?

	<u>Name of Defendant</u>	<u>Immune</u>	<u>Not Immune</u>
FBI	Brennan		✓
	Moore		✓
	Jones		✓
	Grimaldi		✓
	Pangburn		✓
D.C.	Wilson		✓
	Herlihy		✓
	Acree		✓
	Bynum	✓	
	Scraper		✓
	Jagen		✓
	Suter		✓
	Mahaney		✓
	Kolego-Markovich	✓	

Your "immune" answers constitute a verdict for each defendant whom you have found to be immune. If you answered "immune" to all of the foregoing questions in no. 2, you should proceed no further, unless you found the District of Columbia liable in question no. 1. If you have answered any of the foregoing questions in no. 2 "not immune," or found the District of Columbia liable in question no. 1, proceed to the next page.

3. Was the liability of any defendant about whom you answered "yes" to question no. 1 and as to which you answered "not immune" to question no. 2 barred by the Statute of Limitations?

	<u>Name of Defendant</u>	<u>Claims Barred</u>	<u>Claims Not Barred</u>
FBI	Brennan		✓
	Moore		✓
	Jones		✓
	Grimaldi		✓
	Pangburn		✓
D.C.	Wilson		✓
	Herlihy		✓
	Acree		✓
	Bynum	✓	
	Scraper		✓
	Jagen		✓
	Suter		✓
	Mahaney		✓
	Kolego-Markovich	✓	

3a. If you found the District of Columbia liable in question no. 1, was that liability barred by the Statute of Limitations?

Claims barred ☐ Claims not barred ☒

(mark one of the above boxes only if liability has been found in question no. 1).

Your answer of "claims barred" in the questions above constitutes a verdict on those claims for each defendant so identified. If you answered "claims not barred" with respect to any defendant, you should proceed to the next page.

4. If, with respect to claims against a defendant, you have answered "yes" to question no. 1, "not immune" to question no. 2, and "claims not barred" to question no. 3, you should enter opposite the name of that defendant as your verdict the amount of compensatory damages (if any) you find to be required fairly and reasonably to compensate plaintiff Washington Peace Center the amount of punitive damages (if any), and/or the amount of nominal damages (if any) to which you find plaintiff Washington Peace Center is entitled.

	Name of Defen- dant	Amount of Damages Compensatory*	Amount of Damages Nominal*	Amount of Damages Punitive	Total Damages
FBI	Brennan	6250.00		3125.00	9375.00
	Moore	5000.00		2500.00	7500.00
	Jones	3750.00		1875.00	5625.00
	Grimaldi	3125.00		1562.50	4687.50
	Pangburn	3750.00		1875.00	5625.00
D.C.	Wilson	3750.00		1875.00	5625.00
	Herlihy	3125.00		1562.50	4687.50
	Acree	2562.50		0	2562.50
	Bynum	0		0	0
	Scraper	3125.00		0	3125.00
	Jagen	2562.50		0	2562.50
	Suter	2562.50		0	2562.50
	Mahaney	1875.00		0	1875.00
	Kolego- Markovich	0		0	0
	Dist. of Col.	37,937.50		0	37,937.50

Kalter H. Maton
FOREPERSON

*Note: You cannot award both compensatory damages and nominal damages.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIAJULIUS HOBSON, et al.,
Plaintiffs,

v.

JERRY WILSON, et al.,
Defendants.

Civil Action No. 76-1326

FILED

DEC 23 1981

SPECIAL VERDICT FORM

1. Did any of the following defendants injure JAMES E. DAVEY, JR. plaintiff Sammie Abbott in the exercise of that plaintiff's First Amendment rights or participate in one or more conspiracies that so injured plaintiff Sammie Abbott?

Name of Defendant	By claimed Individual Action		By claimed F.B.I. Conspiracy		By claimed M.P.D. Conspiracy		By claimed Joint Conspiracy	
	Yes	No	Yes	No	Yes	No	Yes	No
Brennan	Yes		Yes				Yes	
Moore	Yes		Yes				Yes	
Jones	Yes		Yes				Yes	
Grimaldi	Yes		Yes				Yes	
Pangburn	Yes		Yes				Yes	
Wilson	Yes				Yes		Yes	
Herlihy	Yes				Yes		Yes	
Acree	Yes				Yes		Yes	
Bynum		No			Yes			No
Scrapper	Yes				Yes		Yes	
Jagen	Yes				Yes		Yes	
Suter	Yes				Yes		Yes	
Mahaney	Yes				Yes			No
Kolego-Markovich		No			Yes			No
District of Col.*	Yes				Yes		Yes	

If your answer is "no" to all of the foregoing questions, you should proceed no further; your "no" answers constitute a verdict for defendants. If your answer to any of these questions is "yes," proceed to the next page.

* If you find the District of Columbia liable for the acts of employees, mark the space opposite the District of Columbia entry under "By alleged individual action."

2. Were any of the following defendants immune from responsibility as found in no. 1 above?

	<u>Name of Defendant</u>	<u>Immune</u>	<u>Not Immune</u>
FBI	Brennan		✓
	Moore		✓
	Jones		✓
	Grimaldi		✓
	Pangburn		✓
	Wilson		✓
D.C.	Herlihy		✓
	Acree		✓
	Bynum	✓	
	Scraper		✓
	Jagen		✓
	Suter		✓
	Mahaney		✓
	Kolego-Markovich	✓	

Your "immune" answers constitute a verdict for each defendant whom you have found to be immune. If you answered "immune" to all of the foregoing questions in no. 2, you should proceed no further, unless you found the District of Columbia liable in question no. 1. If you have answered any of the foregoing questions in no. 2 "not immune," or found the District of Columbia liable in question no. 1, proceed to the next page.

3. Was the liability of any defendant about whom you answered "yes" to question no. 1 and as to which you answered "not immune" to question no. 2 barred by the Statute of Limitations?

	<u>Name of Defendant</u>	<u>Claims Barred</u>	<u>Claims Not Barred</u>
FBI	Brennan		✓
	Moore		✓
	Jones		✓
	Grimaldi		✓
	Pangburn		✓
D.C.	Wilson		✓
	Herlihy		✓
	Acree		✓
	Bynum	✓	
	Scrapper		✓
	Jagen		✓
	Suter		✓
	Mahaney		✓
	Kolego- Markovich	✓	

3a. If you found the District of Columbia liable in question no. 1, was that liability barred by the Statute of Limitations?

Claims barred ☐ Claims not barred ☒

(mark one of the above boxes only if liability has been found in question no. 1).

Your answer of "claims barred" in the questions above constitutes a verdict on those claims for each defendant so identified. If you answered "claims not barred" with respect to any defendant, you should proceed to the next page.

4. If, with respect to claims against a defendant, you have answered "yes" to question no. 1, "not immune" to question no. 2, and "claims not barred" to question no. 3, you should enter opposite the name of that defendant as your verdict the amount of compensatory damages (if any) you find to be required fairly and reasonably to compensate plaintiff Sammie Abbott the amount of punitive damages (if any), and/or the amount of nominal damages (if any) to which you find plaintiff Sammie Abbott is entitled.

	Name of Defendant	Amount of Damages Compensatory*	Amount of Damages Nominal*	Amount of Damages Punitive	Total Damages
FBI	Brennan	6250.00		3125.00	9375.00
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	Herlihy	3125.00		1562.50	4687.50
	Acree	2562.50		0	2562.50
	Bynum	0		0	0
	Scraper	3125.00		0	3125.00
	Jagen	2562.50		0	2562.50
	Suter	2562.50		0	2562.50
	Mahaney	1875.00		0	1875.00
	Kolego-Markovich	0		0	0
	Dist. of Col.	37,937.50		0	37,937.50

Walter H. Moten
FOREPERSON

*Note: You cannot award both compensatory damages and nominal damages.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIAJULIUS HOBSON, et al.,
Plaintiffs,

v.

JERRY WILSON, et al.,
Defendants.

Civil Action No. 76-1326

FILED

DEC 1 1976

SPECIAL VERDICT FORM

JAMES E. DAVIS, CLERK

1. Did any of the following defendants injure

plaintiff Washington Area Women Strike For Peace in the exercise

of that plaintiff's First Amendment rights or participate in

or more conspiracies that so injured plaintiff Washington Area Women Strike For Peace?

Name of Defen- dant	By claimed Individual Action		By claimed F.B.I. Conspiracy		By claimed M.P.D. Conspiracy		By claimed Joint Conspiracy	
	Yes	No	Yes	No	Yes	No	Yes	No
Brennan		No		No				No
Moore								
Jones								
Grimaldi								
Pangburn								
Wilson								
Herlihy								
Acree								
Bynum								
Scraper								
Jagen								
Suter								
Mahaney								
Kolego- Markovich								
District of Col.*								

If your answer is "no" to all of the foregoing questions, you should proceed no further; your "no" answers constitute a verdict for defendants. If your answer to any of these questions is "yes," proceed to the next page.

* If you find the District of Columbia liable for the acts of employees, mark the space opposite the District of Columbia entry under "By alleged individual action."

2. Were any of the following defendants immune from responsibility as found in no. 1 above?

	<u>Name of Defendant</u>	<u>Immune</u>	<u>Not Immune</u>
FBI	Brennan		
	Moore		
	Jones		
	Grimaldi		
	Pangburn		
D.C.	Wilson		
	Herlihy		
	Acree		
	Bynum		
	Scraper		
	Jagen		
	Suter		
	Mahaney		
	Kolego- Markovich		

Your "immune" answers constitute a verdict for each defendant whom you have found to be immune. If you answered "immune" to all of the foregoing questions in no. 2, you should proceed no further, unless you found the District of Columbia liable in question no. 1. If you have answered any of the foregoing questions in no. 2 "not immune," or found the District of Columbia liable in question no. 1, proceed to the next page.

3. Was the liability of any defendant about whom you answered "yes" to question no. 1 and as to which you answered "not immune" to question no. 2 barred by the Statute of Limitations?

	<u>Name of Defendant</u>	<u>Claims Barred</u>	<u>Claims Not Barred</u>
FBI	Brennan		
	Moore		
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	Pangburn		
D.C.	Wilson		
	Herlihy		
	Acree		
	Bynum		
	Scrapper		
	Jagen		
	Suter		
	Mahaney		
	Kolego-Markovich		

3a. If you found the District of Columbia liable in question no. 1, was that liability barred by the Statute of Limitations?

Claims barred ☐ Claims not barred ☐

(mark one of the above boxes only if liability has been found in question no. 1).

Your answer of "claims barred" in the questions above constitutes a verdict on those claims for each defendant so identified. If you answered "claims not barred" with respect to any defendant, you should proceed to the next page.

4. If, with respect to claims against a defendant, you have answered "yes" to question no. 1, "not immune" to question no. 2, and "claims not barred" to question no. 3, you should enter opposite the name of that defendant as your verdict the amount of compensatory damages (if any) you find to be required fairly and reasonably to compensate plaintiff Washington Area Women Strike For Peace, the amount of punitive damages (if any), and/or the amount of nominal damages (if any) to which you find plaintiff Washington Area Women Strike For Peace is entitled.

	<u>Name of Defen- dant</u>	<u>Amount of Damages Compensatory*</u>	<u>Amount of Damages Nominal*</u>	<u>Amount of Damages Punitive</u>	<u>Total Damages</u>
FBI	Brennan				
	Moore				
	Jones				
	Grimaldi				
	Pangburn				
D.C.	Wilson				
	Herlihy				
	Acree				
	Bynum				
	Scraper				
	Jagen				
	Suter				
	Mahaney				
	Kolego- Markovich				
	Dist. of Col.				

Walter H. Maton
FOREPERSON

*Note: You cannot award both compensatory damages and nominal damages.

2/23/81

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Sammie A. Abbott,
Abraham Bloom,
Reginald Booker,
Tina Hobson,
Richard Pollock,
Rev. David Eaton,
Washington Area Women Strike
for Peace,
Washington Peace Center,
Arthur Waskow,

Plaintiffs,

v.

Jerry V. Wilson,
Thomas J. Herlihy,
Jack L. Acree,
Christopher J. Scrapper,
Edward J. Jagen,
George R. Suter,
Harold Bynum,
John W. Mahaney,
Ann Kolego Markovich,
District of Columbia,
Charles D. Brennan,
George C. Moore,
Gerould W. Pangburn,
Gerald T. Grimaldi,
Courtland J. Jones,

Defendants.

Civil Action No. 76-1326

FILED

DEC 23 1981

JAMES E. DAVEY, CLERK

JUDGMENT ON THE VERDICT
(FOR PLAINTIFFS)

JUDGMENT ON THE VERDICT
(For Plaintiffs)

This cause having been tried by the Court and a Jury, before the Honorable Louis F. Oberdorfer, Judge presiding, and the issues having been duly tried and the Jury having duly rendered its verdict; now, therefore, pursuant to the verdict,

IT IS ORDERED, ADJUDGED AND DECREED that each of the following plaintiffs: Sammie A. Abbott, Abraham Bloom, Richard Pollock, Washington Peace Center, and Arthur Waskow have and recover of and from each of the following named defendants the amount stated opposite that defendant's name:

<u>Name</u>	<u>Amount</u>
Jerry V. Wilson	Five Thousand Six Hundred Twenty-Five and 00/100 (\$ 5,625.00)
Thomas J. Herlihy	Four Thousand Six Hundred Eighty-Seven and 50/100 (\$ 4,687.50)
Jack L. Acree	Two Thousand Five Hundred Sixty-Two and 50/100 (\$ 2,562.50)
Christopher J. Scrapper	Three Thousand One Hundred Twenty-Five and 00/100 (\$ 3,125.00)
Edward J. Jagen	Two Thousand Five Hundred Sixty-Two and 50/100 (\$ 2,562.50)
George R. Suter	Two Thousand Five Hundred Sixty-Two and 50/100 (\$ 2,562.50)
John W. Mahaney	One Thousand Eight Hundred Seventy-Five and 00/100 (\$ 1,875.00)
Charles D. Brennan	Nine Thousand Three Hundred Seventy-Five and 00/100 (\$ 9,375.00)
George C. Moore	Seven Thousand Five Hundred and 00/100 (\$ 7,500.00)

Gerould W. Pangburn	Five Thousand Six Hundred Twenty-Five and 00/100	(\$ 5,625.00)
Gerald T. Grimaldi	Four Thousand Six Hundred Eighty-Seven and 00/100	(\$ 4,687.00)
Courtland J. Jones	Five Thousand Six Hundred Twenty-Five and 00/100	(\$ 5,625.00)
District of Columbia	Thirty-seven Thousand Nine Hundred Thirty-Seven and 50/100	(\$ 37,937.50)

together with costs.

JAMES F. DAVEY, CLERK

By: *[Signature]*
Deputy Clerk

Date: *Dec 23, 1941*

UNITED STATES DISTRICT COURT FOR THE DISTRICT
OF COLUMBIA

JULIUS HOBSON, et al. :
Plaintiffs :
v. : Civil Action No. 76-1326
JERRY WILSON, et al. :
Defendants :

MOTION OF DISTRICT OF COLUMBIA DEFENDANTS FOR
JUDGMENT NOTWITHSTANDING THE VERDICT OR, IN THE
ALTERNATIVE, FOR NEW TRIAL OR, IN THE ALTERNATIVE
FOR A REMITTITUR

Pursuant to Rules 50(b) and 59, Federal Rules of Civil Procedure, the District of Columbia defendants respectfully move this Court to set aside the verdict returned by the jury in the above entitled cause on December 23, 1981, and notwithstanding the same, to enter judgment in their favor. In the alternative, the District of Columbia defendants move this Court to grant them a new trial or to grant a substantial remittitur. In support of their motion, the District of Columbia defendants rely upon the following grounds:

1. The District of Columbia defendants were entitled to a directed verdict upon their motions at the close of plaintiffs' case and at the close of all the evidence on the grounds that no reasonable jury could have found liability against the District of Columbia defendants based on the evidence introduced at trial. More specifically:

* The District of Columbia defendants joining in this motion are as follows: Jerry Wilson; Thomas Herlihy; Jack Acree; Christopher Scraper; Edward Jagen; George Suter; John Mahoney; and the District of Columbia.

a. There was, as a matter of law, insufficient evidence (and in some instances no evidence) that particular District defendants violated any rights of particular plaintiffs or proximately caused these plaintiffs any compensable injury.

b. Neither the District of Columbia nor its officials were subject to the provisions of 42 U.S.C. §1985(3) at any time relevant to this lawsuit.

c. Plaintiffs have not proven that a civil conspiracy existed between District of Columbia defendants and the federal defendants.

d. No evidence was introduced to overcome the qualified immunity enjoyed by the District's police officers and agents.

e. Intelligence gathering operations do not inhibit First Amendment rights absent an existent or imminently threatened governmental sanction.

f. Plaintiffs have not proven a cause of action under 18 U.S.C. §2520 or D.C. Code, §23-554 (1973).

g. An exchange of information between local and national governments is a lawful and necessary activity.

h. Plaintiffs' claims were barred by the applicable statute of limitations.

i. The District of Columbia cannot be held liable in Constitutional tort under the theory of respondeat superior.

j. District of Columbia defendants are not liable for punitive damages absent a showing of actual malice or wanton and/or reckless disregard for the rights of others.

2. The verdicts returned by the jury were inconsistent and incompatible on their face. More specifically:

a. There were findings of conspiracy and applicability of the statute of limitations and immunity defenses as to some plaintiffs but not all, and as to some defendants but not all, with no corresponding distinctions in the evidence.

b. The verdict multiplies compensation to each plaintiff for each specific injury by as much as a factor of 13, the number of defendants listed on the verdict form against whom a verdict was returned.

c. Although the District of Columbia is merely the employer of the individual District defendants and can only act through its employees and not separately from them, the jury awarded separate and higher damages against the District, in addition to the awards against individual District employees.

d. Although the vast majority of the evidence at trial was presented against the federal defendants, the verdict awards almost two-thirds of the total damages against the District of Columbia defendants.

3. The jury verdict form, employed by the Court over defendants' objections, permitted the jury to make inconsistent findings and to compensate each plaintiff more than one time for a particular injury with the results indicated in ground numbered 2 above.

4. The District defendants were entitled to a mistrial based on the unfair advantage resulting from the unauthorized and improper contact between a discharged juror and plaintiffs' agents while trial was still in session.

5. The jury verdict in this case bears no reasonable relationship to the injuries proved and accordingly is excessive as a matter of law.

Judith W. Rogers
JUDITH W. ROGERS
Corporation Counsel, D.C.

John H. Suda
JOHN H. SUDA
Deputy Corporation Counsel, D.C.

Laura W. Bonn
LAURA W. BONN
Assistant Corporation Counsel, D.C.
Attorneys for District of Columbia
Defendants
District Building
Washington, D.C. 20004
727-6348

George N. Barclay
GEORGE N. BARCLAY
Assistant Corporation Counsel, D.C.
Attorneys for District of Columbia
Defendants
District Building
Washington, D.C. 20004

CERTIFICATE OF SERVICE

I hereby certify that a copy of the District of Columbia Motion of Judgement Notwithstanding the Verdict, in the Alternative For a New Trial or, In the Alternative for a Remittitur, together with Memorandum of Points and Authorities in Support thereof and Orders was mailed, postage prepaid, to Daniel M. Schember, Esquire, Attorney for Plaintiffs, 1712 N Street, N.W., Washington, D.C. 20036; and David White, Esquire, Attorney for Federal Defendants, Department of Justice, Washington, D.C. 20530, this 31st day of December, 1981.

Laura W. Bonn
Assistant Corporation Counsel, D.C.
Attorney for District of Columbia
Defendants
District Building, Room 324
Washington, D.C. 20004
727-6348

1482

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

JULIUS HOBSON, et al.,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action
)	76-1326
JERRY WILSON, et al.,)	
)	
Defendants.)	

MOTION BY DEFENDANTS BRENNAN, MOORE, JONES,
PANGBURN, AND GRIMALDI FOR JUDGMENT NOTWITHSTANDING
THE VERDICT OR, IN THE ALTERNATIVE, FOR NEW TRIAL

Defendants Charles D. Brennan, George C. Moore, Courtland J. Jones, Gerould W. Pangburn, and Gerald T. Grimaldi, through undersigned counsel and pursuant to Rule 50(b) of the Federal Rules of Civil Procedure, move this Honorable Court to set aside the verdict and judgment entered on December 23, 1981, and to enter judgment in favor of these defendants in accordance with the motion for directed verdict made by the defendants at the close of plaintiffs' case in chief and renewed at the close of all the testimony.

In the alternative, these defendants move this Honorable Court to set aside the verdict and the judgment entered thereon and grant defendants a new trial.

In support of this motion the defendants rely upon the record of this action and the attached memorandum of points and authorities.

Respectfully, submitted,

J. PAUL McGRATH
Assistant Attorney General

CHARLES F.C. RUFF
United States Attorney

Brook Hedge
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2/1/82

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS ROBINSON, et al. :
Plaintiffs :
v. : Civil Action No. 76-1326
JERRY WILSON, et al. :
Defendants :

REPLY OF THE DISTRICT OF COLUMBIA DEFENDANTS TO PLAINTIFFS'
OPPOSITION TO THE MOTION OF THE DISTRICT OF COLUMBIA
DEFENDANTS JUDGMENT NOTWITHSTANDING THE VERDICT, OR IN THE
ALTERNATIVE FOR A NEW TRIAL OR IN THE ALTERNATIVE, FOR A
REMITTITUR

This civil action was commenced on July 16, 1976, by a complaint which alleged violations of plaintiffs' Constitutional Rights by the Federal Bureau of Investigation and the Metropolitan Police Department, D.C.

On December 23, 1981 the jury returned verdicts against all the Federal defendants and all but two of the District of Columbia defendants. On December 31, 1981 the District of Columbia defendants filed their motion for judgment notwithstanding the verdict or, in the alternative, for a new trial or, in the alternative, for a remittitur. On January 4, 1982 the District of Columbia defendants filed a supplemental memorandum of points and authorities. On February 10, 1982 after two extensions of time, plaintiffs filed their opposition to the District defendants' post-trial motion. The following reply is submitted in response to plaintiffs' opposition. For the sake of clarity, the responses contained in this reply are arranged in the same order as the arguments in plaintiffs' opposition.

I

Insufficient Evidence, Statute of
Limitations and Qualified Immunity.

A

Insufficient Evidence

The substance of the testimony relating to each plaintiff is set forth in pages 4-13 of defendants Memorandum. As is amply demonstrated therein the injuries allegedly sustained by plaintiffs were, in fact, non-existent or, in no way connected to the conduct of the District defendants. In response, plaintiffs' list eleven facts upon which, they argue, the jury could have reasonably concluded that the District defendants proximately caused plaintiffs damage. (See p. 2, Plaintiffs' Opposition). Examination of these "facts" reveals that none of them truly support a verdict against the District of Columbia defendants.

"Facts" (a), (b) and (c): (a) files were maintained on all demonstrator groups; (b) use of informants. (c) Hobson files, lack of guidelines.

These "facts" standing alone prove nothing. Intelligence gathering operations which result in files or any other compilation do not, under the facts of this case, give rise to a constitutional violation. (See Defendants' Memorandum, p. 21, 22 and cases cited therein). Plaintiff offered no evidence demonstrating how these facts impinged upon any of their constitutional rights or proximately caused their injuries recognized by law. Specificity as to conduct, defendant and harm is utterly lacking. Nor, indeed, is any specificity provided in plaintiffs' opposition.

"Facts" (d): disruptions of demonstration by District of Columbia police agents.

Such activity is beyond the scope of mere intelligence gathering and as such is actionable. However, there was no proof that such activity was undertaken by any District of Columbia agent. One alleged, provocateur, Jan Francis, was not a member of the Intelligence Division or under the supervision of any District of Columbia defendant. The second identified provocateur, Ann Kolego-Markovich was found not liable. Accordingly, there was no competent evidence that any District of Columbia defendant or agent engaged in such activity. Thus, there is no connection between this fact and any plaintiff and/or defendant.

"Fact" (e): theft of mailing lists and contributions list from 1029 Vermont Avenue

Evidence on this issue indicated that the injuries sustained, if any, by the Washington Peace Center resulted from activities of the FBI. There was no testimony that the activities of the Metropolitan Police Department interfered in any way with activities of this plaintiff. (See defendant memorandum p. 13).

"Fact" (f): smashing of a xerox machine at 1029 Vermont Avenue.

While Spiker may have boasted about such an incident in his statement, the only evidence was the testimony of Sidney Peck that the machine was out of order. No plaintiff recalled a damaged machine or any harm from it, and it is certainly plausible, as Sidney Peck admitted, that the machine was simply out of order due to a mechanical malfunction.

"Fact" (g): contacts between the FBI and the Metropolitan Police Department.

Such contacts are legitimate and proper law enforcement function and do not give rise to constitutional violations (See p. 22, Defendant Memorandum).

"Fact" (h): destruction of Intelligence Division files in 1974.

Several District of Columbia defendants testified that the destruction was a routine purging of outdated material undertaken subsequent to the reorganization of the Intelligence Division. In light of the total absence of evidence to the contrary the jury could not properly have inferred an ulterior motive as suggested by plaintiffs.

"Fact" (i): money available to Metropolitan Police Department to augment Intelligence operation.

Plaintiffs' assertion that such a grant contributed to improper or illegal activity is unsupported by any evidence and is incorrect on its face.

"Fact" (j): Three plaintiffs' witnesses "suspected" the role of Steve Wilcox in disrupting telephone service to New MOBE Offices.

This allegation is sheer conjecture by plaintiffs, as is evidenced by plaintiffs' own use of the word "suspected." Moreover, even these suspicions were rebutted by direct testimony that such an individual was never employed by the District of Columbia defendants for any capacity.

"Fact" (k): unknown agents in under cover capacity.

Aside from the fact that the use of under cover agents is a legitimate law enforcement technique, there was no testimony as to these unknown agents ^{/what} did or how anything they did infringed upon any constitutional protected right of any of the plaintiffs'.

It is evident that these "facts" do little or nothing to fill the gaps and specific insufficiencies of evidence underlying plaintiffs' claims. Even if they were all true, they would only become actionable if they resulted in specific harm to a specific plaintiff and were causally connected

with the act of a defendant or defendants. Neither the evidence adduced by plaintiffs nor their opposition memorandum makes such a connection.

As to plaintiffs' claims regarding electronic surveillance, physical surveillance and supplying the public with false information. No evidence was adduced at trial which could support a finding of liability against the District defendants on these issues. Plaintiff Waskow was the only identified plaintiff overheard through electronic surveillance and given the uncertainty of whether the "bug" was placed through court order or one party consent, liability is unfounded. Moreover, whether consensual bugging is transgressed when the consenting party is absent is, by plaintiffs' own admission, an open question. Under these circumstances, there is no way it can be alleged that the District of Columbia defendants lacked a good faith reasonable belief in the propriety of the one party consensual bugging.

In sum, there was, as a matter of law insufficient evidence that particular District of Columbia defendants violated any rights of particular plaintiffs or proximately caused therein any compensable injuries. As such, there was no basis from which a jury could reasonably infer liability against the District of Columbia defendants. This observation is highlighted by plaintiffs inability to specify any such evidence in their opposition. Therefore, the District of Columbia defendants are now entitled to a judgment notwithstanding the verdict.

B

Qualified Immunity

Plaintiffs' argument against qualified immunity is unpersuasive in that it suggests improper inferences drawn by the jury and fails to include any contrary evidence.

which qualified immunity could be rebutted. There was no evidence to suggest that the destruction of the files was done with ulterior motives. Indeed, it was explained by several witnesses. Nor should the jury have been allowed to draw any inferences from the failure of the District of Columbia defendants to produce additional witnesses since plaintiffs were free to call any witness they chose to call and since, quite properly, no missing witness instruction was given. Similarly, the mere fact that some of the organizations which were infiltrated were peaceful does not lead to a conclusion that the District of Columbia defendants acted unreasonably or in bad faith. Infiltration is not per se actionable, and the mere fact of such infiltration cannot overcome defendants qualified immunity. (See defendants memorandum of points and authorities at pp. 20-22).

C

Statute of Limitations

Plaintiffs fail to address any of the issues raised by the District of Columbia defendants on this issue. Instead they refer to three points, none of which is particularly relevant. As stated repeatedly there was no evidence that the destruction of the files was an attempt to conceal evidence. The only evidence was that the files were purged of out-dated material (see defendant memorandum p. 23, 24). Therefore, the jury could not infer that the purge constituted fraudulent or deliberate concealment. Secondly, the District of Columbia defendants were under no obligation to make their files public. Accordingly there were no additional facts to provide evidence of aggravation upon which a jury could find fraudulent or deliberate concealment. See Smith v. Nixon, 196 U.S. App. D.C. 276, 406 F.2d 1183, 1191, 74-24 (1979).

II

Liability under §42 U.S.C. §1985(3) and/or civil conspiracy.

As consistently maintained by the District of Columbia defendants, neither the District of Columbia nor any of its agents were subject to §1985(3) at any time relevant to this lawsuit. See District of Columbia defendants' pre-trial brief, District of Columbia defendants' memorandum p. 14-15}. It is correct, as plaintiffs and the court note, that there is no state action requirement under §1985. It is erroneous, however, to then conclude that "the issue of whether the District of Columbia is a state or territory" loses its significance. Both District of Columbia v. Carter, 409 U.S. 418 (1973) and Hurd v. Hodge, 334 U.S. 24 (1946) attest to the significance of the issue. Plaintiffs' reliance on Hurd is inapposite since it is concerned with a statute deriving from the Civil Rights Act of 1866 at not the KKK Act of 1871 from which §1985 derives. The important point is that for §1985(3) to apply, the prohibited activities must have occurred in a "state or territory". Since the District of Columbia is not a "state or territory" within the meaning of section 1985(3), that provision cannot be applied in the case at bar.

Plaintiffs alleged and the jury found three conspiracies one involving the District of Columbia defendants, another involving the Federal defendants at a third consisting of both District of Columbia and Federal defendants. As stated in District of Columbia defendants' memorandum under the facts of this case, as a matter of law, no conspiracy could exist among the District of Columbia defendants. (See District of Columbia defendants' memorandum p. 16). The named District of Columbia defendants were all employees of a single entity and acted in furtherance of the policy of that entity. See Edwards v. Willey 425 F. Supp. 702.

(N.D. Ohio, 1980). See also 52 A.L.R. Federal 106 and cases cited therein. For the same reasons the District of Columbia itself cannot conspire with itself through its agents. These points were not addressed in plaintiffs' opposition and should be deemed conceded.

Likewise plaintiff does not respond to the District of Columbia defendant argument pertaining to the Metropolitan Police Department, FBI conspiracy except to the extent that they allege both entities targetting the same class. Plaintiffs fail to address the legitimacy of inter agency cooperation, differing objectives and lack of an agreement as raised in pages 18-19 of defendants memorandum. The evidence adduced at trial and alluded to ^{/in} plaintiffs' opposition clearly fails to support a finding of a joint conspiracy.

III

Respondeat Superior

Plaintiffs mistakenly confuse policy with conduct. Under Monel v. N.Y.C. Department of Social Services, 436 U.S. 658 (1978) a municipality may not be liable under the theory of respondeat superior for constitutional torts. The mere fact that the District defendant were involved in intelligence work, which is a legitimate function, and the fact that misconduct may have occurred in some instance is not sufficient to impose liability upon the District of Columbia. There is simply no affirmative link between the adoption of the intelligence gathering policy and the alleged police misconduct which shows authorization or approval of such misconduct. See Rizzo v. Goode, 428 U.S. 362 (1976). (See defendant memorandum p. 25).

IV

Punitive Damages

Contrary to plaintiffs' assertion, there was no evidence that defendants Wilson and Herlihy either condoned or encouraged any alleged misconduct. Being high level supervisory personnel, they were not intimately connected with the day to day activities and can hardly be said to have acted with reckless disregard of plaintiffs' rights.

Finally, neither defendant is now employed by the District, both having retired. Accordingly neither the conduct of these defendants nor their present positions justify an award of punitive damages to deter any future conduct by them.

V

Inconsistent Verdicts

The issue of inconsistent verdicts was fully addressed in defendants memorandum ^{/and} supplemental memorandum. Plaintiffs' opposition does not, in fact, respond fully to the long list of inconsistencies explained at great length in defendants' memorandum. See defendants' memorandum, pp. 28-30 and defendant supplemental memorandum).

VI

Multiple Recovery

Plaintiffs' claim that there wasn't a multiple verdict because, according to plaintiff, the jury "determined an overall figure and then divided this sum by the number of defendants it found liable, proportionating it according to culpability." (Plaintiffs' opposition p. 9). Even if that were the case, it would indicate only that the jury improperly applied a comparative liability theory in determining damages. In fact, by assessing separate verdicts against each defendant, rather than one compensation to each

plaintiff, the jury effectively multiplied the each awards plaintiff by a factor of thirteen. (See defendant memorandum, pp. 29-30).

VII

Higher Award Against the District of Columbia.

It remain inexplicable how the District of Columbia as the employer of the individual District defendants and who can only act through its employees and not separately from them can be assessed separate and greater awards in addition to the awards against the individual District employees (see defendants' memorandum, p. 30). The District cannot be held liable under respondeat superior for constitutional torts of employees. (See Monell v. N.Y.C. Department of Social Services, 436 U.S. 568 (1978), and it can hardly be held liable, as plaintiff suggest, for constitutional torts of unidentified actors.

VIII

District Defendants liable for a Greater Share of the Total Damages Than Federal Defendants

Clearly the great weight of evidence was against the Federal defendants. The only District connection to this evidence was through the alleged conspiracies, the existence of which was unsupported legally and factually (see this reply, ante). Plaintiffs' assertion that "there is no requirement that an individual conspirator be assessed only that amount which corresponds directly to his degree of involvement" (Plaintiffs' opposition, p. 10), Flies in the face of plaintiffs' attempt to justify the jury's "proportioning" the jury award, which is contained in plaintiffs' defense of the multiple verdict on page 9 of plaintiffs' opposition.

IX

Contact with an excused juror

Plaintiffs' counsel's contacts with the excused juror were clearly in violation of the local rule 1-28 since that rule prohibits any contact with jurors both before and after discharge without prior court approval. See Defendants' memorandum, p. 32. Plaintiffs' attempt to twist the clear import of Rule 1-28 is surprising, at best. Plaintiffs' explanation obviously does not meet the question of unfair advantage which plaintiffs obtained in using information from the contacted juror in formulation of their closing arguments.

X

Excessive Verdict

The fact that plaintiffs' were not aware of the surveillance activities until years later (according to plaintiffs) belies their argument that they suffered any to significant emotional harm or that the conduct of the District defendants' thwarted plaintiffs' activities in any significant way.

Thus, the amount of this judgment is totally out of proportion to any harm that has been suffered by plaintiffs. Bearing no rational relationship to the harm, it is excessive. As a matter of law. (See defendants' memorandum pp. 33-34).

Conclusion

Based on the foregoing, the District of Columbia Defendants respectfully move this court to set aside the verdict returned by the jury in this cause on December 20, 1971, and notwithstanding the same, to enter judgment in their favor. In the alternative, the District of Columbia Defendants move this court to grant them a new trial or to

and a substantial remittitur.

JUDITH W. ROGERS
Corporation Counsel, D.C.

JOHN H. SUDA
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727-6303

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply of the District of Columbia Defendants To Plaintiffs' Opposition To The Motion Of The District of Columbia Defendants For Judgment Notwithstanding The Verdict, Or In The Alternative For A New Trial Or In The Alternative, For A Remittitur, was mailed, postage prepaid to, Ann Pillsbury, Esquire, Attorney for Plaintiffs, 17 Danford Street, Norway, Maine 04268; and David White, Esquire, Attorney for Federal Defendants, Department of Justice, Washington, D.C. 20530, this 19 day of February, 1982.

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C-21/82

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS HOBSON, et al., :
Plaintiffs :
v. : Civil Action No. 76-1326
JERRY WILSON, et al. :
Defendant :

THE DISTRICT OF COLUMBIA DEFENDANTS' STATEMENT
ON DAMAGES IN RESPONSE TO THIS COURT'S ORDER
OF APRIL 14, 1982

Introduction

On December 23, 1981, the jury returned verdicts in favor of eight plaintiffs in the total amount of \$711,937.50. These verdicts are not only unsupported by the evidence but also are excessive and bear no reasonable relationship to the injuries, if any, proven by plaintiffs. In general, the supposed injuries to plaintiffs were largely subjective, and even plaintiffs do not claim to have realized there was any invasion of their rights until long after the acts had been allegedly committed. As such, any real or imagined harm to plaintiffs was insubstantial and diluted by the passage of time.

On April 14, 1982, the Court invited the parties to file brief statements of the evidence supporting their contentions on the issue of damage. As will be more fully developed below no plaintiff produced evidence justifying the enormous verdicts returned.

Specific Items or Evidence Demonstrating Absence of Damage

A. Sammie Abbott.

This plaintiff was awarded \$93,750. Mr. Abbott testified mainly about his role in ECTC and the November 16, 1969 demonstration at

the Three Sisters Bridge site. He testified that ECTC was infiltrated by Harold Bynum whom he later discovered to be an officer with the MPD. Bynum was described as never being disruptive during the meetings and as rarely, if ever participating in any of the discussions. Further, he never advocated violence or confrontation. Indeed a warm relationship developed between Officer Bynum and Mr. Abbott. Importantly, the jury returned a verdict in favor of Officer Bynum finding that he did not violate any of the plaintiffs protected rights. Accordingly, this plaintiff suffered no damage as a result of the infiltration by Officer Bynum of the ECTC.

The only other evidence relating to plaintiff Abbott's claim against the District defendants relates to the November 16, 1969 demonstration. In this regard he testified that the demonstration was staged at Georgetown University. He stated that an unidentified MPD officer had warned him not to march down to the site of the Three Sisters Bridge or that the demonstrators would be tear gassed. He further testified that he instructed the demonstrators not to march down to the site, but that two white males from the crowd interrupted him and called him a "sell-out". Abbott testified that he left the demonstration before a splinter group marched off the campus to the bridge site. In 1974 someone identified one of the provocateurs to Abbott as Jan Francis, an MPD officer. There was no testimony that Jan Francis was an officer in the Intelligence Division or under the supervision of any of the named defendants.

Accordingly, the only injury suffered by this plaintiff was the supposed loss of an opportunity to demonstrate in the November 16, 1969 demonstration. Given the extremely tenuous connection between this supposed loss and any act committed by

any of the District of Columbia defendants any liability based thereon is speculative at best. Assuming arguendo liability in this instance, the damages awarded to this plaintiff are clearly excessive and lacking any rational relationship to the evidence.

B. Abe Bloom.

This plaintiff was awarded \$93,750. He testified that while active in the Washington Area Peace Action Coalition (WAPAC), he became acquainted with defendant Jagen who had infiltrated the group as an undercover officer in the Intelligence Division. While Jagen attended meetings and did volunteer work, the testimony revealed that he never removed anything from the WAPAC offices or in any way disrupted their activities. Plaintiffs advanced no other testimony or evidence regarding this plaintiff, WAPAC or any other District of Columbia defendant.

Accordingly, the supposed injuries suffered by plaintiff Bloom were limited to injuries, if any, resulting from the minimally intrusive infiltration undertaken by defendant Jagen. Such an infiltration cannot even support a finding of liability, let alone any damage to plaintiff Bloom.

C. Reginald Booker.

This plaintiff was awarded \$81,062.50. Plaintiff Booker testified that he became acquainted with defendant Bynum in 1968 at which time he was active in an organization known as the Emergency Committee on the Transportation Crisis (hereinafter referred to as ECTC). Booker testified that defendant Bynum began attending meetings of this organization and even accompanied him to a convention in Toledo, Ohio. At these meetings defendant Bynum never took an active part in the discussions nor attempted to change the peaceful orientation of the organization to more radical means.

In 1969, plaintiff Booker was informed by someone that defendant Bynum was a police officer. Booker testified that he did nothing further at that time to investigate these allegations against Bynum. A year later, in 1970, Booker was again informed that defendant Bynum was a police officer. Booker testified that the source of his information was a friend who had seen Bynum in full police uniform at District Court. Plaintiff Booker did not recall seeing defendant Bynum again and he testified that Bynum stopped attending meetings of ECTC in 1970.

2

The testimony at trial revealed that the only injuries alleged by plaintiff Booker with respect to District defendants resulted from the presence of defendant Bynum at ECTC meetings. Defendant Bynum testified that he was attending these meetings in order to ascertain the location of future demonstrations, number of people predicted to attend and the purpose of the demonstration. Bynum testified that he believed this assignment to be a necessary and lawful activity to assist the police department in monitoring demonstrations. As noted above, this sort of investigative activity which does not cause or threaten specific objective harm does not violate the constitutional rights of plaintiffs, and allegations or proof of subjective "chill" in the exercise of rights is not compensable in damages. Laird v. Tatum, supra, 408 U.S. 1 (1972). Moreover, the jury found defendant Bynum to be not liable. Since there was no other evidence of illegal acts by District of Columbia defendants resulting in injuries to this plaintiff, the verdict against the District of Columbia defendants and resulting damage awarded to this plaintiff were clearly unsupported.

\ D. David Eaton.

This plaintiff was awarded \$81,061.50. He did not testify to any damages which were proximately caused by any of the

District of Columbia defendants. The only other testimony in this respect came from defendant Bynum concerning his attendance of Black United Front (BUF) meetings for approximately a year. Since defendant Bynum was found not liable such activities clearly cannot support an award of damages against the District of Columbia defendants.

Accordingly, the verdict and damage award in favor of this defendant is clearly against the weight of evidence with respect to the District of Columbia defendants.

E. Tina Hobson.

This plaintiff was awarded \$82,062.50. No evidence was presented at trial justifying a verdict against the District of Columbia defendants. The one incident arguably involving the Metropolitan Police Department was her testimony that a demonstration she attended was interrupted by smoke bombs set off, she believed, by the police. As a result, the demonstration was not as orderly as planned and she claimed a loss of her First Amendment Rights. On cross-examination, she admitted that she didn't see the police set off the bomb. Indeed given the distance between her and the incident, there was no way she could have seen who actually set off the smoke bombs. She conceded that this incident had no real effect on her political involvement during the relevant period.

F. Richard Pollack.

This plaintiff was awarded \$93,750. Plaintiff Pollack testified that he was active in numerous organizations during the relevant period of time involved in this lawsuit. In the summer of 1971 he became acquainted with defendant Ann Kolego Markovich through her work as a volunteer in the office of the Peoples Coalition for Peace and Justice (hereinafter PCPJ). According to the testimony of Pollack, defendant Kolego Marovich attended numerous meetings of PCPJ and was often "volatile and disruptive" during these meetings.

He testified that during one meeting defendant Kolego Markovich suggested that members of PCPJ push over buses in front of the White House in order to be noticed. These suggestions were not accepted by the majority of the members of the organization. Pollack also testified that he had seen defendant Kolego Markovich at a demonstration at the Capitol Building in the fall of 1971 and saw her yelling profanities at the police in addition to throwing objects at these police and urging others attending the demonstration to do the same.

However, the jury either did not believe plaintiff Pollack's testimony or they determined that defendant Kolego Markovich's conduct did not warrant a finding of liability against her, since the jury returned a verdict in her favor. Given that there was no other testimony presented by plaintiff Pollack to support his claim of injuries by the D.C. defendants, the verdicts returned against the other D.C. defendants are clearly unsupported by the evidence.

G. Arthur Waskow.

Plaintiff Waskow testified that during the relevant times periods involved in this lawsuit he was employed at the Institute for Policy studies (hereinafter IPS) in addition to being active in numerous anti-war organizations. Waskow testified that in 1971 he became acquainted with Robert Merritt, a volunteer who worked at IPS and was later identified to Waskow as an informant for the Metropolitan Police Department. Plaintiff Waskow testified that his relationship with Merritt was tenuous at best, because he doubted the credibility of Merritt and always felt that his "demeanor appeared to be a little shaky." The only other evidence presented at trial with respect to injuries allegedly sustained by plaintiff Waskow by the Metropolitan Police Department was a note in his FBI file that the Metropolitan Police Department had gotten a typewriter ribbon from Waskow's typewriter and turned it over to the FBI. Moreover, plaintiff Waskow did

not testify as to any damages sustained as a result of these incidents.

The only other evidence that was presented with respect to plaintiff Waskow came from a sworn statement of Charles Marcum. In his statement Marcum indicated that he had monitored a frequency and intercepted the voice of Arthur Waskow. There was no indication from the statement whether this interception was made pursuant to a lawful wiretap or with the consent of one party.

Based on the testimony presented at trial there was no evidence that plaintiff Waskow was injured by any of these incidents or that any of the District defendants were directly involved in any improper conduct. Under these circumstances, verdicts returned against the District of Columbia defendants is clearly unsupported by the evidence.


H. Washington Peace Center.

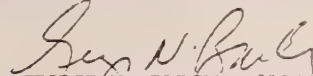
The plaintiff was awarded \$93,750. The only evidence introduced against the District of Columbia defendants was a portion of the statement of Thomas Okeson, a former member of the MPD who stated that he used to hang around the Washington Peace Center and copy addresses that were on their file cards. No testimony was adduced by any of their representatives as to any damage that may have resulted from such activity. Accordingly, a damage award based solely on that statement is purely speculative.

CONCLUSION

It is clear that plaintiff presented little or no evidence of compensable injuries caused by the activities of the MPD defendants. Given the nature of the MPD activities, by and large confined to legitimate intelligence gathering, the verdicts returned against the District of Columbia defendants are not only excessive but also clearly against the weight of evidence.

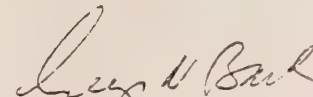

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing District of Columbia Defendants' Statement on Damages in Response to this Court's Order of April 14, 1982, was mailed, postage prepaid, to Anne Pilsbury Esquire, Attorney for Plaintiffs, 17 Danforth Street, Norway, Maine 04268; and David White, Esquire, Attorney for Federal Defendants, Department of Justice, Washington, D.C. 20530, this 29 day of April, 1982.


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5/27/82

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS HOBSON, et al. :
Plaintiff :
v. : Civil Action No. 76-1326
JERRY WILSON, et al. :
Defendants :

REPLY OF D.C. DEFENDANTS TO PLAINTIFFS' STATEMENT
OF THE EVIDENCE RELATING TO HARM

Pursuant to this Court's Order dated April 14, 1982, plaintiffs filed a 33-page statement purporting to establish that the jury's verdicts were not excessive. Scattered throughout that statement were isolated references to the alleged Metropolitan Police Department misconduct and the harm supposedly resulting therefrom. At most, references to injuries allegedly caused by the District of Columbia defendants would occupy a total of approximately 2 pages out of the 33 pages of supposed harms to plaintiffs, the remainder being devoted to injuries allegedly caused by the federal defendants. Even arguendo, if, the few references to the District defendants were accurate, it is clear that the alleged injuries to plaintiffs mentioned therein cannot support the enormous verdicts returned against the D.C. defendants.

Moreover, as demonstrated below, even the few allegations made against the District defendants are not grounded in fact or law:

Tina Hobson: Reference is made to the demonstration held at the U.S. Capitol in May 1972 wherein "agents provocateurs" provoked a police reaction by throwing tear gas canisters. Tina Hobson could not see who started the incident. At best she could only testify that there was disruption in the rear of the Capitol grounds. Importantly, she admitted that this incident had no affect on her

Involvement at that demonstration or in any way impinged upon her rights. No other evidence of MPD misconduct affecting her was adduced.

Abe Bloom: Reference was made to a bad check sent to the telephone company alleged by Steve Wilcox, a supposed informant. In fact, the check was covered and telephone service was not disrupted. Thus, no real harm resulted therefrom. Moreover, no evidence was adduced by plaintiffs to prove that Steve Wilcox was in the employ of the MPD. On the contrary, the D.C. defendants produced evidence establishing that they did not employ him. Bloom further claims to have "suffered" harm upon discovering that a trusted co-worker (Jagen) was an MPD officer. The law does not recognize such misplaced trust as a legal injury. See Hoffa v. United States 385 U.S. 293 (1966). No other evidence of MPD misconduct and harm are alleged.

Richard Pollack. Reference is made to unmarked police cars parked in front of his residence. The evidence established that these incidents did not defer this plaintiff in the exercise of his rights. Reference is made to Anne Kolego-Markovich attending PCPJ meetings; her supposedly disrupted role; and her alleged provocations of police reaction. Plaintiffs seem to have forgotten that the jury found her not liable. No other evidence of MPD misconduct and harm are alleged.

Reginal Booker: Reference is made to his participation in the Three Sisters Bridge Demonstration which was disrupted by supposed "agents provocateurs". Not only was such a supposition unproven, but also this plaintiff suffered no harm. Any claim of harm resulting from defendant Bynum's infiltration of groups in which Booker was active must be discounted since the jury found Bynum not liable. Moreover, such infiltration is not improper. See Philadelphia Yrly. Meet. Rel. Soc. of Friends v. Tate, 519 F.2d 1335 (3rd Cir. 1975). There were no other allegations of MPD misconduct and harm.

Arthur Waskow: No allegations of MPD misconduct and harm are advanced in plaintiffs' statement.

Washington Peace Center: Reference is made to mailing lists taken from their office and informant infiltration. No showing of harm is advanced.


Sammie Abbott: Reference is made to the Three Sisters Bridge Demonstration. No showing of MPD involvement in the disruption is made, nor is any harm proven.

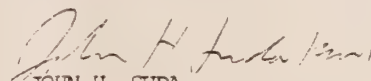
Rev. David Eaton: Reference is made to defendant Bynum attending BUF meetings. Bynum was found not liable. No other evidence of MPD misconduct and harm is advanced.

Punitive Damages Against Wilson and Herlihy

Plaintiffs claim that the award of punitive damages against these defendants is justified because they allegedly failed to establish guidelines for the intelligence operation and thereby effectively condoned illegal acts. Certainly, the alleged failure to establish guidelines, even if true, cannot support an award of punitives. See Nader v. Allgheny Airlines, Inc., 168 U.S. App., D.C. 255, 512 F.2d 527, 549-550 (1975), rev'd on other grounds, 426 U.S. 290 (1976).

In sum, the few references contained in plaintiffs' lengthy statement filed April 28, 1982, to injuries supposedly caused by the District of Columbia defendants are not supported by the evidence at trial or by the case law. Moreover, even if these allegations were supported, the paucity of damage claims against the District of Columbia defendants in plaintiffs' own compilation vividly attests to the excessiveness of the verdicts against those defendants.


JUDITH W. ROGERS
Corporation Counsel, D.C.

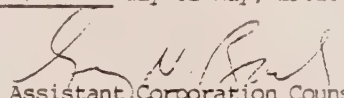

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply of D.C.
Defendants to Plaintiffs' Statement of the Evidence Relating to Harm,
was mailed, postage prepaid, to Anne Pilsbury, Esquire, Attorney for
Plaintiffs, 17 Danforth Street, Norway, Maine 04268; and David White,
Esquire, Attorney for Federal Defendants, Department of Justice,
Washington, D.C. 20530, this 4 day of May, 1982.



Assistant Corporation Counsel, D.C.
Attorney for District of Columbia
Defendants
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Anne Pilsbury
ATTORNEY AT LAW
17 Danforth Street - Norway, Maine 04268

TELEPHONE
207 / 743-5583

CENTER LOVELL
207 / 925-1144

May 12, 1982

Hon. Louis F. Oberdorfer
United States District Court
3rd and Constitution Aves. N.W.
Washington, D.C. 20001

RE: HOBSON v WILSON
Civil Action 76-1326

Dear Judge Oberdorfer:

Since the post-trial pleadings on the damage claims in this case appear to be complete, I wanted to clarify for the Court and counsel what the plaintiffs' position is in regard to the other side of the case -- the prayer for injunctive relief.

As you know the amended complaint asks that the original FBI files on the plaintiffs be turned over to them and all copies destroyed. That is still the plaintiffs' position.

In addition, based on the evidence produced at trial, the plaintiffs would urge the Court to exercise its discretion to grant additional injunctive relief and to enter a permanent injunction prohibiting the federal defendants from reinstating a COINTELPRO-NEW LEFT or COINTELPRO-BLACK NATIONALIST program and to prohibit the District of Columbia defendants from creating or participating in such programs in the future.

Although we believe the trial record supports the need for this type of injunctive relief, we would welcome the opportunity to put on additional evidence going to present practices.

Sincerely yours,

Anne Pilsbury

Anne Pilsbury
Counsel for plaintiffs

cc. Clerk, US District Court
David H. White, Esq.
George N. Barclay, Esq.
bc: all plaintiffs - 5/17/82
Herb Semmel, Esq.
Mort Stavis, Esq.
Mary Pike, Esq.
Randy Scott-McLaughlin, Esq.
Art Spitzer, Esq.

1st JNOV

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS HOBSON, et al.,

Plaintiffs,

v.

JERRY V. WILSON, et al.

Defendants.

Civil Action No. 76-138

FILED

JUN - 1 1981

MEMORANDUM

JAMES F. DAVEY,

Plaintiffs brought this action for damages and injunctive relief against the District of Columbia and a number of active and retired members of the Metropolitan Police Department ("MPD") and the Federal Bureau of Investigation ("FBI").^{1/} The amended complaint filed October 28, 1977, alleged that defendants had systematically violated plaintiffs' constitutional rights, individually and through conspiracies, while plaintiffs engaged in lawful protest against government policy in the late 1960's and in the 1970's in the Washington area. Trial of the damages claim began on November 23, 1981, and continued for seventeen days.^{2/} A jury of six returned verdicts, after nearly five days

^{1/} Numerous defendants named in the amended complaint obtained voluntary dismissal of claims against them prior to submission of the issues to the jury. Defendants remaining in the litigation when the case was submitted to the jury are identified infra at 2-3.

^{2/} The parties had pursued discovery for several years, during which time the case was assigned to several judges of this Court. The final trial date had been established in the Pretrial Order filed August 14, 1981.

of deliberation, on December 23, 1981.^{3/} Now before the Court are motions pursuant to Fed.R.Civ.P. 50(b), 59(a) for judgment notwithstanding the verdicts or, in the alternative, for a new trial.^{4/}

I. Introduction

The verdicts the jury returned found most of the defendants liable to plaintiffs and awarded most of the plaintiffs substantial sums in compensatory and punitive damages. The total amount of all awards to the eight prevailing plaintiffs against the 13 defendants found liable to them was \$711,937.50. Three plaintiffs recovered \$81,062.50 each and five recovered \$93,750 each.^{5/} One plaintiff, the Washington Area Women Strike for Peace ("WAWSP"), was found not to have been injured by any defendant, and consequently had no recovery.

The individual defendants found by the jury to be liable to

^{3/} A blank copy of the special verdict form is attached as Appendix I.

^{4/} Consideration of the prayer for equitable relief has awaited disposition of the damages claim in the district court.

^{5/} The three plaintiffs recovering the lesser sum were Tina Hobson, an activist in the anti-war and civil-rights movement in Washington since 1964; David Eaton, a member of the Black United Front who protested against American involvement in the Indochina war; and Reginald Booker, a civil-rights activist who served on the Emergency Committee on the Transportation Crisis ("ECTC"), a local ad hoc citizens' group that inter alia opposed destruction of dwellings in older Washington neighborhoods to make way for new highways. The five plaintiffs recovering the greater sum were Abraham Bloom, an organizer of the Washington Area Peace Action Coalition ("WAPAC"); Arthur Waskow, a fellow of the Institute for Policy Studies ("IPS"), a Washington organization for the study of public policy; Sammie A. Abbott, an anti-war activist and ECTC organizer; Richard Pollock, a former college journalist active in anti-war organizations based in Washington, and for a time an office worker for the People's Coalition for Peace and Justice; and the Washington Peace Center ("WPC"), a permanent organization that seeks to redirect military spending to other uses and that participated through its membership in protests in Washington against the Viet Nam War.

Plaintiff Julius Hobson died prior to trial of the damages claim and his claims were not pursued. Plaintiff ECTC apparently discontinued prosecution of its claims prior to assignment of this case to the trial judge.

One or more plaintiffs included five persons employed at FBI headquarters or the FBI Washington Field Office ("WFO"). Defendant Brennan was a section chief, and later assistant director, of the FBI's Domestic Intelligence Division from 1966 to 1971. Defendant Moore served from 1967 to 1974 as a section chief in the same division as Brennan. Defendant Jones held the post of Security Coordinating Supervisor at WFO from 1964 to 1974. Defendant Grimaldi worked as a special agent at WFO from 1968 to 1970 and defendant Pangburn held a similar position from 1968 to 1972.

The defendants employed by the District of Columbia included former MPD Chief Wilson, former Intelligence Division Inspector Herlihy, and four officers assigned to the Intelligence Division during some of the years when plaintiffs claimed to have been injured. Those officers were defendant Acree, a sergeant at the relevant time; defendant Scrapper, also a sergeant; defendant Suter, then a lieutenant; and defendant Mahaney, then a line officer. The other individual MPD defendants were three undercover officers assigned to the Intelligence Division during the relevant period: defendants Bynum, Jagen, and Markovich.

According to plaintiffs, the FBI defendants collaborated with each other, with other FBI agents, and with the MPD defendants in a variety of efforts to impede plaintiffs' association with others for the purpose of publicly expressing opposition to government policies, chiefly opposition to the Viet Nam War and to policies espoused by national and local officials on race relations. Many of defendants' activities alleged to have injured plaintiffs were related to COINTELPRO, a then-secret FBI activity begun in 1967 and discontinued in the early 1970's. COINTELPRO had two components: COINTELPRO-New Left, which concerned activities of persons opposed to American involvement in the Viet Nam War and other related policies of the national government, and COINTELPRO-Black Nationalist, which

concerned activities of persons seeking enhancement of civil rights for black persons. According to a memorandum prepared by defendant Brennan and circulated to the other FBI defendants and to agents across the country, COINTELPRO, in its "New Left" dimension, had the following objective:

- The purpose of this program is to
- expose, disrupt, and otherwise neutralize the activities of this group
 - and persons connected with it. It is hoped that with this new program their violent and illegal activities may
 - be reduced if not curtailed.

Plaintiffs' Exhibit 3. The purpose of COINTELPRO-Black Nationalist, according to an earlier memorandum, was inter alia to "[p]revent the coalition of militant black nationalist groups;" the Southern Christian Leadership Conference, then headed by the Rev. Dr. Martin Luther King, Jr., was one of four "primary targets" listed in the same memorandum.^{6/} The memorandum that

^{6/} The memorandum to the field offices announced five goals for the "Black Nationalist" COINTELPRO undertaking:

1. Prevent the coalition of militant black nationalist groups...
 2. Prevent the rise of a "messiah" who could unify, and electrify, the militant black nationalist movement...
 3. Prevent violence on the part of black nationalist groups...
 4. Prevent militant black nationalist groups and leaders from gaining respectability, by discrediting them...
 5. ...[P]revent the long-range growth of military black nationalist organizations, especially among youth.
- Plaintiffs' Exhibit 2 (emphasis in original).

The memorandum went on to instruct the field offices to develop plans for "counterintelligence action" and to submit them for approval and "field-wide" coordination. See Plaintiffs' Exhibit 2. As part of the program, field offices were to report, every 90 days, on "[a]ny changes in the overall black nationalist movement [including] new organizations, new leaders, and any changes in data" previously obtained by the FBI. Id. An earlier memorandum had similarly informed the field offices that "Black Nationalist" groups had to be watched, and that "[t]he activities of all such groups of intelligence interest to this Bureau must be followed on a continuous basis so we will be in a position to promptly take advantage of all opportunities for counterintelligence and to inspire action in instances where circumstances warrant." Plaintiffs' Exhibit 1.

See generally S. Rep. No. 94-755, Supp. Vol. 3 (Staff Report of Select Committee to Study Governmental Operations with respect to Intelligence Activities). See also note 12 infra (discussing memorandum establishing COINTELPRO-New Left).

had initiated COINTELPRO-Black Nationalist advised the agents to whom it was addressed, "You are urged to take an enthusiastic and imaginative approach to this new counterintelligence endeavor and the Bureau will be pleased to entertain any suggestions or techniques you may recommend." See Plaintiff's Exhibit 1. In addition to testimony there were in evidence some FBI documents indicating that COINTELPRO interfered tangibly with the protest activities of the kind carried on by plaintiffs. See, e.g., Plaintiffs' Exhibit 13 (WFO reporting that FBI distribution of fictitious addresses for housing of demonstrators at 1968 Chicago demonstrations caused "numerous demonstrators" to make "useless trips to locate non-existent addresses."); Plaintiffs' Exhibit 69 ("security squad Buagents" supervised by defendant Jones instituted "an intensive interview program in the New Left community . . ." which "produced tangible results in the disruption of the day to day activities in the New Left communes . . ."). At trial, plaintiffs asserted, and the jury-evidently was persuaded, that plaintiffs were victims of three conspiracies, actionable under 42 U.S.C. § 1985(3), to violate their civil rights. One such conspiracy, the jury found, included the five FBI defendants; another encompassed certain of the MPD defendants; and a third involved both FBI and MPD defendants. The jury also found that many of the defendants, acting outside the scope of any conspiracy, injured various plaintiffs in the exercise of their First Amendment rights. The First Amendment rights plaintiffs alleged had been violated included the opportunity to assemble for political protest, to associate with others in order to engage in political expression, and to speak on public issues, free of unreasonable government interference. Plaintiffs offered evidence of broad undertakings by defendants to disrupt their activities and of specific instances in which FBI and MPD action allegedly impeded those activities.

Only two defendants, Bynum and Markovich, were found to be not liable to any plaintiff. Having determined that the other defendants were liable on various claims, the jury awarded varying sums to the prevailing plaintiffs against those defendants. The jury found all defendants other than Markovich and Bynum liable to plaintiffs Bloom, Abbott, Pollock, Waskow, and WPC. The jury also returned verdicts for plaintiffs Hobson, Eaton, and Booker against the five FBI defendants but, among the MPD defendants, only against former Chief Wilson and former Inspector Herlihy. All defendants except the District of Columbia and MPD officer Mahaney were found to be liable for both compensatory and punitive damages.^{7/} The largest judgment against any individual defendant was that awarded against defendant Brennan, whom the jury found personally liable for \$9,375 to each of the eight prevailing plaintiffs, for a total of \$75,000 of which \$50,000 was compensatory, and \$25,000 punitive damages. The jury returned the smallest award against defendant Mahaney, who was found liable to five plaintiffs for \$1,875 each, for a total of \$9,375, all compensatory. Every prevailing plaintiff recovered \$37,937.50, all compensatory, from the District of Columbia.^{8/}

In their present motions for relief from the verdicts, the defendants found liable to various plaintiffs state numerous grounds for judgment notwithstanding the verdict ("judgment n.o.v.") and for a new trial. Defendants assert that the instructions on conspiracy and on the defense afforded by the statute of limitations were erroneous, and that even if the instructions were correct, the jury improperly found conspiratorial liability and improperly denied them relief from

^{7/} In each instance in which the jury awarded punitive damages against a defendant to a particular plaintiff, the punitive award was one-half the amount of compensatory damages.

^{8/} See chart on p. 52 infra.

plaintiffs' claims under the statute of limitations. Defendants also assert that the damages awarded were excessive, and that the Court erred in not instructing the jury that the United States would not pay an award against the FBI defendants. The District of Columbia objects to the instructions on municipal liability, and, assuming arguendo the instructions were not erroneous, to the verdicts the jury returned against it. And all defendants also claim that the verdicts against them for conduct allegedly performed outside the scope of the alleged conspiracies similarly were not supported by the evidence. There are numerous other objections in defendants' motions.^{9/} Each plaintiff also has sought judgment n.o.v. against defendants Bynum and Markovich, and plaintiff WAWSP seeks judgment against all the other defendants as well as Bynum and Markovich.^{10/} For the reasons stated below, the Court will deny all motions, except the motion of defendants Wilson and Herlihy for relief from the jury's award of punitive damages.

II. The Instructions and Proof of Liability

A. Liability under 42 U.S.C. § 1985(3)

1. The Conspiracy Instructions

In their motion for a new trial the District of Columbia defendants renew their argument, first advanced at a

^{9/} Defendants also assert that the Court's special verdict form was prejudicial or confusing; that the Court's rulings on admissibility of certain FBI records and documents were prejudicially erroneous; that the evidence, even if it required an instruction on punitive damages, did not support the jury's determination that they should be awarded; and that a new trial is required because the Court denied a motion for mistrial based upon defendants' discovery of an allegedly improper contact between one of plaintiffs' counsel and members of the jury. Defendant Jones argues that he is entitled to relief because the Court denied various motions that would have dismissed claims against him or granted him a separate trial at a later date.

^{10/} There also remains a motion for sanctions against defendant Markovich for an alleged violation of the discovery obligations imposed by Fed.R.Civ.P. 37(d).

pretrial conference and in their pretrial brief, that employees of the District cannot be liable as "persons within any State or Territory" under the terms of 42 U.S.C. § 1985(3). Defendants rest their argument on the interpretation of 42-U.S.C. § 1983 in District of Columbia v. Carter, 409 U.S. 418, 420-24 (1973), in which the Supreme Court held that District employees did not in the course of their official duties act---for purposes of 42 U.S.C. § 1983---under color of law of "any State or territory". so as to make their conduct actionable under section 1983.^{11/} This action is based, however, on section 1985(3). The conspiracies that are actionable under 42 U.S.C. § 1985(3) exist whether or not the participants act under color of any official authority. The Carter decision, which did not require construction of the geographical terms of section 1985(3) that are at issue here, is wholly immaterial to this case. See District of Columbia v. Carter, *supra*, 409 U.S. at 421-424; cf. Hurd v. Hodge, 334 U.S. 24, 31 (1948) (construing language identical to section 1985(3) in 42 U.S.C. § 1982). Hurd v. Hodge controls the question here. It would indeed be anomalous if private discriminatory conduct enjoyed a geographical immunity simply because it occurred in the nation's capital. Cf. Hurd v. Hodge, *supra*, 334 U.S. at 31. Accordingly, defendants' motion on this issue cannot be granted.

Defendants also assert now, as they did at trial, that there was no evidence of "class-based discriminatory animus" to justify an instruction on liability under 42 U.S.C. § 1985(3). Griffin v. Breckenridge, 403 U.S. 88, 96-104 (1971), established the basic elements of conspiracies actionable under section 1985(3). The proof of a conspiracy to violate civil rights is often circumstantial, and determination of the ultimate factual

^{11/} Congress, in Pub.L. No. 96-170, amended section 1983 in 1979 to limit the Carter decision. See 93 Stat. 1284; [1979] U.S. Code Cong. & Admin. News 2609.

questions of intent is peculiarly within the province of the jury. Adickes v. S.H. Kress & Co., 398 U.S. 144, 175-88 (1970) (Black, J., concurring in the judgment). The District of Columbia defendants appear, however, to argue that it was error to instruct the jury on section 1985(3) because the alleged conspiracy was not based on racial animus. See generally Griffin v. Breckenridge, supra, 403 U.S. at 102 n.9. Passing for the moment the question whether there was sufficient evidence for the verdicts that the jury returned, it is long past dispute that section 1985(3) does not require that the targets of the conspiracy be members of a particular racial group. That principle has been clear at least since Glasson v. City of Louisville, 518 F.2d 899 (6th Cir.), cert. denied, 423 U.S. 930 (1975). The cases now make it plain that it is the agreement vel non among the alleged conspirators to single a particular group or class for discriminatory interference with constitutional rights that should itself define the class for purposes of section 1985(3). If a conspiracy actionable under section 1985(3) does exist, it will have defined for itself the group or class of persons it intends to victimize. See Scott v. Moore, 640 F.2d 708, 718-19 (5th Cir. 1981); cf. Kimble v. McDuffy, 648 F.2d 340, 346-47 (5th Cir. 1981) (en banc); see also Canlis v. San Joaquin Sheriff's Posse Comitatus, 641 F.2d 711, 719 n.15 (9th Cir. 1981) (collecting cases). See generally Hampton v. Hanrahan, 600 F.2d 600, 624 (7th Cir. 1979), cert. denied on these grounds, rev'd in part on other grounds, 100 U.S. 1987 (1980). In this case plaintiffs offered, as proof of conspiratorial consensus defining the target classes, FBI memoranda launching COINTELPRO and directing agents' attention to "New Left" and "Black Nationalist" political associations, as well as testimony of

participants in the FBI program.^{12/} Plaintiffs also examined the MPD defendants on the criteria explicitly used by the Intelligence Division to identify targets for the Division's activities, and they closely questioned the MPD defendants on the implications of those criteria. There was substantial evidence from which the jury could have found that the alleged conspiracies targeted plaintiffs as opponents of the Viet Nam war or proponents of racial justice. Accordingly, the Court could not have kept plaintiffs' claims of conspiracy from the jury. See Adickes v. S.H. Kress, supra; Hampton v. Hanrahan, supra.

Conceding arguendo that the conspiracy issues had to be put to the jury, the FBI defendants raise specific objections to the content of some of the conspiracy instructions. One of their objections is that the Court incorrectly defined "overt act." The Court defined "overt act" using the familiar standard

^{12/} An FBI memorandum written by defendant Brennan on May 9, 1968, proposing that the Bureau establish what became COINTELPRO-New Left, described the objectives of the program in this way:

"Our Nation is undergoing an era of disruption and violence caused to a large extent by various individuals generally connected with the New Left. Some of these activists urge revolution in America and call for the defeat of the United States in Vietnam. They continually and falsely allege police brutality and do not hesitate to utilize unlawful acts to further their so-called causes. The New Left has on many occasions viciously and scurrilously attacked the Director and the Bureau in an attempt to hamper our investigation of it and to drive us off the college campuses. With this in mind, it is our recommendation that a new Counterintelligence Program be designed to neutralize the New Left and the Key Activists. The Key Activists are those individuals who are the moving forces behind the New Left and on whom we have intensified our investigations.

Plaintiffs' Exhibit 3. See also Plaintiffs' Exhibits 1, 2 (COINTELPRO-Black Nationalist). The significance of the COINTELPRO directives and definitions for defendants' motion for judgment notwithstanding the verdicts on the conspiracy claims is considered at pp. 14-15, infra.

instruction in the District of Columbia "Red Book."^{13/} As the FBI defendants correctly observe, a recovery under section 1985(3) may be had only if a plaintiff suffered an injury as a result of an act taken in furtherance of the conspiracy. See 42 U.S.C. § 1985(3) ("... the party so injured or deprived may have an action for the recovery of damages occasioned by such injury"); cf. Edwards v. James Stewart & Co., 82 U.S.App.D.C. 123, 125, 160 F.2d 935, 937 (1947); Fitzgerald v. Seaman, 384 F.Supp. 688, 693 (D.D.C. 1974), rev'd on other grounds, 180 U.S.App.D.C. 75, 553 F.2d 220 (1977). Nevertheless, proof of the agreement itself, as distinct from compensable injury, may derive from evidence of acts done by conspirators, whether or not the act caused an injury that would be actionable under section 1985(3). See, e.g., Hampton v. Hanrahan, supra, 600 F.2d at 624.^{14/} Thus when the FBI defendants contend that the Court erred in failing to instruct that "the overt act which makes the conspiracy actionable must have caused actual injury to the person, property or rights of the plaintiff," they presumably mean to assert that the Court failed to instruct the jury that an overt act in furtherance of the conspiracy must have injured the plaintiff, if that plaintiff is to have a recovery for that injury under section 1985(3).

The FBI defendants have not fairly read the Court's instructions. The Court instructed the jury that "the defendant must . . . have been proved by a preponderance of the evidence to have been a member of the conspiracy at the time the co-

^{13/} The Court thus advised the jury, "An 'overt act' is simply any act knowingly committed by one of the conspirators, in an effort to effect or accomplish some object or purpose of the conspiracy."

^{14/} In this case, for example, plaintiffs offered extensive evidence of defendants' efforts to maintain secrecy regarding various FBI and MPD operations. While that conduct would not be actionable under section 1985(3), proof of it could have assisted the jury in assessing the character of the alleged conspiracies. See Hampton v. Hanrahan, supra, 600 F.2d at 622.

conspirator acted to injure the plaintiff in furtherance of his
of her conspiratorial agreement."^{15/} Any question in the jury's
mind that only acts in furtherance of the conspiracy causing
injury were compensable must have been put to rest by the Court's
subsequent instruction that liability would depend upon proof
that "the act causing injury was committed by some one or more of
[the] defendant's co-conspirators," if it had not been committed
by the defendant himself. The separation of the basic
definitions of the civil conspiracy from the elements of proof of
liability in the instructions was merely a function of the fact
that a Court's instructions, like any other exposition, can only
address one point at a time. "The impact of a jury instruction
'is not to be ascertained by merely considering isolated
statements, but by taking into view all the instructions
given.'" Curtis Publishing Co. v. Butts, 388 U.S. 130, 156-57
(1967) (quoting Seaboard Air Line Ry. v. Padgett, 236 U.S. 668,
672 (1915)). The instructions here introduced all the major
terms the jury needed to apply, including "overt act," and then
led the jury through the order of proof of the various claims and
defenses. No juror who followed the Court's instructions could
have conscientiously returned a verdict on the conspiracy theory
for a plaintiff unless the juror believed that the plaintiff had
proved that he or she had been injured by an act taken by a
defendant or some other co-conspirator in furtherance of the
conspiracy.

Defendants' second objection to the conspiracy instructions
is that the instructions permitted the jury to find a defendant
liable under section 1985(3) without having found him to possess
the Breckenridge "discriminatory animus." That objection, too,

^{15/} The verbatim transcript of most of the proceedings in this
case, including instruction of the jury, has not now been filed
in the record. Quotations from the instructions in this
Memorandum are drawn from the Court's notes, and are believed to
match the instructions given the jury.

gives an implausible reading of the instructions. The instructions, incorporating the familiar principles of general ill-conspiracy doctrine,^{16/} explained to the jury that "the participants in a conspiracy share the same general conspiratorial objective: there exists a meeting of the minds which creates an understanding to achieve the conspiracy's objectives. Thus all participants know the common plan; each knows the conspiracy's essential nature and general scope." The instructions then defined a conspiracy actionable under section 1985(3) as one in which "the conspiracy discriminated with hostile intent against a group or class to which plaintiff belonged, with a view to singling out that group or class" for interference with its members' rights under the Constitution.^{17/} Under those instructions, the raison d'etre for the conspiracy was discrimination "with hostile intent against a group or class to which plaintiff belonged," and to find a defendant liable for the conspiracy, the jury had to find that that defendant knew and agreed to the "general conspiratorial objectives." While the instructions did state that a plaintiff must prove that "the conspiracy discriminated with hostile intent," a person could not have been in the conspiracy, according to the instructions, unless he agreed to the "general conspiratorial objectives." The jury could not, under these instructions, have thought "the conspiracy" to be capable of some distinct "hostile intent" not shared by those who had formed the conspiracy and defined its objectives, inasmuch as a conspiracy is simply an agreement among individuals to act together in particular ways. Thus defendants' second attack on the

^{16/} See Hampton v. Hanrahan, supra, 600 F.2d at 620-23.

^{17/} The relevant concept of discrimination itself was explained to the jury as an objective, on the part of the conspiracy, to single out the class or group "for interference with its rights, equal to that of the general public, to assemble or associate for political purposes."

conspiracy instructions, like the first, has no basis in a reasonable reading of the instructions.

The Conspiracy Proof

Defendants argue that they are entitled to judgment n.o.v. on the conspiracy issues. The evidentiary criteria for grant of judgment n.o.v. match those for grant of a directed verdict. Murphy v. United States, 653 F.2d 637, 640 (D.C.Cir. 1981). Neither form of relief from a determination of the facts by a jury is appropriate unless "the evidence, together with all reasonable inferences that can reasonably be drawn therefrom, is so one-sided that reasonable men could not disagree on the verdict." Vander Zee v. Karabatsos, 191 U.S.App.D.C. 146, 149, 589 F.2d 723, 726 (1978), cert. denied, 441 U.S. 962 (1979). In this case, defendants' view of the jury's verdicts, and the evidence upon which the verdicts were based, is not persuasive.

Defendants' principal argument for judgment n.o.v. is that the evidence demonstrated that they were simply law-enforcement officers performing their duties within relatively small, closely-knit organizations: the MPD Intelligence Division, the WFO, and the FBI headquarters unit. Undoubtedly the fact that defendants were co-workers within various police and intelligence organizations would not alone establish the conspiratorial liability the jury found. Cf. Girard v. 94th Street & Fifth Avenue Corp., 530 F.2d 66, 70-72 (2d Cir. 1976); Rackin v. University of Pennsylvania, 386 F.Supp. 992, 1005 (E.D.Pa. 1974). Yet is it also possible for officers belonging to the same law-enforcement unit to conspire among themselves to engage in conduct denounced by the Civil Rights Act and actionable under section 1985(3). See Hampton v. Hanrahan, supra, 600 F.2d at 621, 623-24; cf. Rackin v. University of Pennsylvania, supra.

In the present case, plaintiffs introduced substantial documentary evidence of close coordination within WFO, and

between WFO and other FBI units, including headquarters, to disrupt and discredit individual and group protest activities the agents believed to be part of the "New Left" or "Black Nationalism." The evidence of that concerted activity indicated that, consistent with FBI practice, individual agents exercised considerable discretion and initiative, subject to higher authorities' approval, in planning and working together to disrupt protest activities in which plaintiffs were involved. There was also evidence of a similar pattern of activity among the MPD defendants, though the evidence concerning MPD activity was less extensive than that regarding the FBI.^{18/} Moreover, plaintiffs introduced evidence of regular contacts between supervisory personnel of the Intelligence Division, including some defendants, and WFO agents engaged in COINTELPRO activities. On the other hand, MPD defendants denied at trial any recollection of participation by them in any concerted illegal activities with the FBI, and all the defendants indicated that whatever they did to obstruct plaintiffs' activities was assumed by them to be specifically required by their orders from higher officials.

Passing for the moment the question whether defendants were entitled to official immunity,^{19/} and addressing only the character of their action as conspiracy vel non, the motions for judgment n.o.v. are not well-taken. The Court instructed the jury that "the fact that the individual defendants were engaged in law enforcement work in particular agencies of the F.B.I. and the police department is not, standing alone, proof of a conspiracy, nor does that fact preclude the existence of a

^{18/} According to testimony of some witnesses, the Intelligence Division operated without extensive written guidelines and without recording all its activities in written reports, and many records that did exist were destroyed in the 1970's.

^{19/} See pp. 32 - 36 infra.

conspiracy between some or all of them." That instruction was delivered at defendants' request. Only by impermissibly weighing the evidence could the Court now overturn the verdicts that built upon that instruction. Plaintiffs adduced documentary evidence and live testimony of wide-ranging long-term efforts by all the defendants to disrupt plaintiffs' political activities. Evidence of express agreements to violate plaintiff's constitutional rights was, predictably, absent from plaintiffs' case, for the most part. But direct evidence of an agreement to achieve a particular purpose need not be present. Cf. Vander Zee v. Karabatsos, supra, 191 U.S.App.D.C. at 150, 589 F.2d at 727 (contract formation); see also Adickes v. S.H. Kress & Co., supra (civil conspiracy).

How much a particular defendant may have known of the overall design to violate First-Amendment rights was critical to plaintiffs' case. Defendants denied knowledge of any conspiracy or scheme to disrupt lawful protests. There was evidence, including key documentary evidence, to the contrary. The scope of a defendant's knowledge of arrangements existing between other persons must often be deduced from circumstantial evidence. If the inferences the jury has drawn from that evidence are reasonable, then the verdict must stand. Cf. Boutros v. Riggs Nat'l Bank, 655 F.2d 1257, 1259-60 (D.C.Cir. 1981). Particularly is this so when the evidence did show without contradiction that defendants were positioned in organizations where oral and written information was required to move up and down and to and from them in a chain of command, as a matter of course. Cf. Hampton v. Hanrahan, supra. In light of this and similar evidence the Court cannot disturb the jury's judgment on the issue of conspiratorial liability.

B. Liability based upon non-conspiratorial conduct

Plaintiffs also alleged that individual defendants engaged in conduct proximately injuring plaintiffs that was not part of a conspiratorial design. The jury returned verdicts for most of the plaintiffs upon that theory of non-conspiratorial liability, and defendants found liable on that theory now seek judgment n.o.v.

Many of the defendants held supervisory positions within the MPD or the FBI. As supervisors they had authority to direct the conduct of other agents and line officers, informants, and so-called agents provocateurs. In order to be held accountable in damages for the action of a subordinate, however, the supervising officer must have so exercised his authority as to have made his own conduct a proximate cause of the injury suffered by the victim. See Owens v. Haas, 601 F.2d 1242, 1245-47 (2d Cir. 1979), cert. denied, 444 U.S. 980 (1980); cf. Monell v. Department of Social Services, 436 U.S. 658, 694 n.58 (1978); Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978); Carter v. Carlson, 144 U.S.App.D.C. 388, 393-95, 447 F.2d 358, 363-65 (1971) rev'd. on other grounds, 409 U.S. 418 (1973); Tate v. District of Columbia, Civil Action No. 81-846 (D.D.C., Oct. 26, 1981) (Greene, J.). The instructions so stated.

When the defendants moved for a directed verdict at the close of plaintiffs' evidence, the Court, without objection from plaintiffs, granted the motions of ten of them, most of whom were present or former MPD officers. There was evidence, however, that all of the other defendants played a role in the program of harassment and disruption outlined by plaintiffs' evidence, and the evidence of their personal involvement, beyond the scope of what could properly be considered a conspiratorial plan or agreement, was not so insubstantial that it could be taken from the jury. The evidence against the defendants left in the action after the motion for a directed verdict was in some instances largely circumstantial. Defendant Mahaney, for example, an MPD officer who coordinated activities of the undercover agents Bynum

and Markovich, was found liable to some plaintiffs even though Bynum and Markovich were found not liable to the same plaintiffs. There was evidence, however, that other MPD undercover activity injured plaintiffs, and the jury could have inferred that Mahaney had a supervisory role in that other injurious activity. Plaintiffs' case against FBI defendant Pangburn also was to a large degree circumstantial. Pangburn was found liable to all the prevailing plaintiffs, even though he appears to have worked principally in the so-called "Racial Matters" dimension of COINTELPRO. The jury nonetheless returned verdicts against him in favor of plaintiffs with no direct involvement in Pangburn's own civil-rights target groups. But those verdicts were supported by evidence that the disruption of the civil-rights movement, and the somewhat successful effort to discourage civil-rights activists from participation in anti-war protests, impeded plaintiffs engaged in either activity from free exercise of their First-Amendment rights. The Court's task is at an end if it can discern any permissible theory of liability upon which the jury may have relied; the evidence upon which that theory may have been based need not be "strong." Murphy v. United States, supra, 653 F.2d at 646. The plausibility of plaintiffs' theories of liability and the credibility of the evidence for and against those theories are ultimately the business of the trier of fact.^{20/} The motions for judgment n.o.v. on the jury's findings of non-conspiratorial liability cannot be granted.

^{20/} Defendants appear not to argue that the jury failed to distinguish between conspiratorial and non-conspiratorial liability in making its findings; defendants do, however, argue that plaintiffs recovered more than once for the same injuries and that the damages therefore are excessive. The latter problem is discussed infra at pp. 53-54. Even if defendants did argue that the jury found the same acts to be chargeable under both the conspiratorial and non-conspiratorial theories of liability, their attack would fail. There is no reason to doubt that, in finding liability on both types of theory, the jury first determined the scope of the conspiracy, and then determined whether there were any injuries caused by a defendant's conduct that was unconnected to participation in the conspiracy.

C. Municipal liability

The District of Columbia, arguing that it could not have been liable on any theory to the plaintiffs, challenges the verdicts that the jury returned against it. According to defendant, the District of Columbia government "cannot be held liable under the theory of respondeat superior." Defendant's statement is undoubtedly correct. See Monell v. Department of Social Services, supra, 436 U.S. at 691. But the Court did not instruct the jury in a manner permitting recovery under respondeat superior. The instructions informed the jury that plaintiffs could recover damages from the District government only if an employee causing injury acted "in execution of the District's laws, policies, or customs;" those "policies or customs," as the Court explained, had to be "policies or customs that are made by its law-makers," or "policies that are generally enforced by District employees in the community with the implicit approval of the District government." Since the decisions in Monell v. Department of Social Services, supra, and Owen v. City of Independence, 100 S.Ct. 1398 (1980), the principle of municipal liability for constitutional torts has had a firm basis.^{21/} There is no basis in this case for distinguishing the

^{21/} Monell v. Department of Social Services, supra, overruled Monroe v. Pape, 365 U.S. 167 (1961), insofar as Monroe had held that local governments were not among the "persons" whom 42 U.S.C. § 1983 subjects to civil liability. In Monell the Court established that "a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." 436 U.S. at 694. In Owen v. City of Independence, supra, the Supreme Court rejected a construction of section 1983 that would have allowed municipalities a qualified "good faith" immunity from liability for constitutional violations. Noting that section 1983 "was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations," the Supreme Court concluded that its rule also "harmonizes well with developments in the common law," and suggested that municipal liability without "good-faith" immunity was essential to assure the "innocent individual who is harmed by an abuse of governmental authority . . . that he will be compensated for his injury." 100 S.Ct. at 1416, 1418-19.

rules established in Monell and Owen for section 1983 municipal liability from those governing the liability of the District of Columbia in non-statutory constitutional litigation. The District's employees may be liable under a Bivens theory, and the rules governing their liability are generally to follow those existing under the statutory remedy. Cf. Dellums v. Powell, 184 U.S.App.D.C. 324, 333, 566 F.2d 216, 225 (1977), cert. denied, 438 U.S. 916 (1978). The District should be exposed to the same municipal liability, and have the benefit of the same limitations on that liability, as that attaching to other city governments.^{22/}

Defendant does not even appear in its motion for relief from the verdicts to press the argument that its liability should be different from that existing under Monell because its employees were not, prior to 1979, liable under section 1983. Instead, the District argues that the "evidence adduced by plaintiffs in this suit" was simply insufficient to permit an award under the Monell standard. Monell, and the Court's instruction based upon it, created an issue of fact of whether the District employees' actions were taken with the approval of the government. Plaintiffs argued and offered evidence that use of agents provocateurs and other plainly illegal conduct were common in the Intelligence Division. Counsel for the District were content to rest their defense principally on an MPD General Order that

^{22/} The Court of Appeals decided Dellums v. Powell prior to Monell, and expressly based the theory of municipal liability it employed on what the Court of Appeals termed "respondeat superior" liability predicated on the liability of various employees. While the use of classic respondeat superior vicarious liability has been precluded by Monell, the broader significance of Dellums for this action remains: if the District should have been liable vicariously for the acts of its employees in Dellums, it follows that, in the wake of Monell, municipal responsibility should attach to actions of its employees that it "approved" and that injured plaintiffs in the exercise of their constitutional rights. There is simply nothing in the special status of the District of Columbia that would require---or permit---a unique rule to govern constitutional torts committed by District employees who are themselves liable on a Bivens rationale. See 184 U.S.App.D.C. at 332-33, 566 F.2d at 224-25.

blandly stated that the Intelligence Division's legitimate duties in the relevant period were to anticipate and deter unlawful disruptions within the District of Columbia. The jury was entitled to find that, despite that MPD directive, illegalities that injured plaintiffs in the exercise of their First-Amendment rights did occur, and were municipal practice, approved in the manner contemplated by the Monell Court. Given the record in this case, the Court cannot disturb the jury's judgment that some of the District employees' conduct was conduct executing the local government's policies and customs.

The jury found that the District government was liable for the participation of its employees in the conspiracies plaintiffs proved to have existed within the MPD and between MPD and FBI personnel. The Court could not, in view of the decision in Owens v. Haas, 601 F.2d 1242, 1247 (2d Cir. 1979), cert. denied, 444 U.S. 980 (1980), have withdrawn the issue of municipal conspiratorial liability from the jury on the theory that the District government is not a "person." Moreover, defendant has, at no stage of this litigation, objected to the instructions as impermissibly permitting a verdict of conspiratorial liability against itself because it is not a "person" within the meaning of 42 U.S.C. § 1985(3). Corporation Counsel's argument regarding the applicability of section 1985(3) to the District government was limited to the question, discussed at pp. 7-8 supra, of whether the District falls within the geographical terms of the statute that makes actionable certain conduct within "any state or territory." Defendant made no attempt to disturb the Court's decision to rely on the holding in Owens v. Haas that a municipal corporation is a "person" for purposes of 42 U.S.C. § 1985(3); indeed, Corporation Counsel did not cite Owens v. Haas on any question related to section 1985(3). To open this issue at this late stage of this protracted case would be contrary to considerations of fair and orderly trial administration. Cf. City

of Newport v. Fact Concerts, Inc., 101 S.Ct. 2748, 2754 n.11 (1981). See generally Monell v. Department of Social Services, supra (municipal corporation a "person" within meaning of 42 U.S.C. § 1983); but cf. Owen v. City of Independence, supra (municipal corporation incapable of satisfying prerequisites for "good faith" immunity).

III. The Statute of Limitations

In September 1981 the FBI defendants sought judgment on the pleadings based upon the statute of limitations. Plaintiffs, the FBI defendants claimed, had failed to commence suit upon their rights of action within three years from the time those rights accrued, and the longest statute of limitations that might apply to the claims in this case was three years. Plaintiffs replied to defendants' motion by seeking benefit of the doctrine of fraudulent or deliberate concealment. Plaintiffs alleged that the FBI and MPD defendants had deliberately concealed their program of disruption in the late 1960's and early 1970's from the public and from plaintiffs, and that consequently plaintiffs could not, through the exercise of due diligence, have learned the material facts necessary to commence the lawsuit within three years of the injuries they suffered. Defendants, however, offered in support of their motion newspaper and magazine articles from the early 1970's that, according to defendants, should have provided plaintiffs with the material facts needed for commencement of suit; defendants also offered statements by various plaintiffs at depositions that they knew someone was either observing their activities or harrassing them, and that they had, as early as 1968, considered suing government officials in response. Plaintiffs opposed the motion for judgment on the pleadings with evidence that the FBI and MPD had attempted to

maintain strict secrecy about COINTELPRO and the MPD's anti-protest activities. Not until 1976, they argued, after the hearings of the Church Committee and the inquiries of the D.C. City Council, did they possess the information they needed to sue in vindication of their First-Amendment rights.

The Court denied the motion for judgment on the pleadings.^{23/} See Hobson v. Wilson, Civil Action No. 76-1326 (D.D.C., Oct. 29, 1981). The Court determined that the applicable statute of limitations was the three-year statute in D.C. Code 12-301(8) (1973 ed.), and concluded that issues of fact were presented regarding inter alia the state of plaintiffs' actual knowledge of their rights of action on July 16, 1973, the date three years before they commenced this action.^{24/} As the Court noted, the doctrine of fraudulent or deliberate concealment attaches to every statute of limitations applied in federal-question litigation. See Holmberg v. Armbrecht, 327 U.S. 392, 397 (1946). Issues of this character are not readily susceptible to summary disposition.^{25/} See, e.g., Richards v. Mileski, 662 F.2d 65, 73 (D.C.Cir. 1981); Smith v. Nixon, 196 U.S.App.D.C. 276, 283, 606 F.2d 1183, 1190 (1979); Fitzgerald v. Seamans, 180 U.S.App.D.C. 75, 83, 553 F.2d 220, 228 (1977); cf. Emmet v. Eastern Dispensary & Casualty Hospital, 130 U.S.App.D.C. 50, 396 F.2d 931 (1967); see also Davidov v. Honeywell Inc., No. 4-77 Civ. 152 (D.Minn., June 12, 1981), slip op. at 6-7. And if the

^{23/} A similar motion had been denied without prejudice to renewal when this case was assigned to Judge Pratt. See Hobson v. Wilson, Civil Action No. 76-1326 (D.D.C., Nov. 9, 1979).

^{24/} The Court found that such an application of D.C. Code 12-301(8) to be the law of the case. See Memorandum and Order of October 29, 1981 at 2. Judge Pratt's prior Order, while denying the earlier motion without prejudice to renewal, unequivocally decided that the three-year statute was the longest that might apply to plaintiffs' claims.

^{25/} A plaintiff may, for example, have known his telephone was bugged, or that agents were watching him, without knowing of the conspiracy to disrupt First-Amendment activities.

entitlement to equitable relief under the doctrine of fraudulent or deliberate concealment depends on questions of fact, those issues of fact must be resolved in a damages action by the jury. See Music Research, Inc. v. Vanguard Recording Soc'y, 547 F.2d 192 (2d Cir. 1976); cf. Briskin v. Ernst & Ernst, 589 F.2d 1363 (9th Cir. 1978); Jones v. Rogers Memorial Hospital, 143 U.S.App.D.C. 51, 442 F.2d 773 (1971).

A. The Statute of Limitations Instructions

The recent discussion of the order of proof on a claim of fraudulent or deliberate concealment in Richards v. Mileski, supra, together with the seminal decision in Fitzgerald v. Seamans, supra, provided the basis for the instructions to the jury. The Court of Appeals in Fitzgerald v. Seamans established that a plaintiff's knowledge that some defendants were responsible for his injury did not necessarily mean that the plaintiff would have had sufficient knowledge of other defendants' involvement intelligently to have prosecuted his claims against the others. See 180 U.S.App.D.C. at 84, 553 F.2d at 229. In Richards v. Mileski the Court of Appeals determined that a plaintiff's knowledge that the defendants had injured plaintiff through false accusations that he was not suitable for a job was not equivalent, for purposes of the doctrine of fraudulent or deliberate concealment, to knowledge that those same defendants knew the accusations were false, and that the defendants were involved in a conspiracy to use the accusations against the plaintiff and to conceal their falsehood.

Because the present case involved so many parties and so many particularized allegations of injury, the jury's task was formidable: it had to determine, with respect to each claim, whether a particular plaintiff was, as to a particular defendant on that particular claim, barred from suit by the statute of limitations. As the Court explained that task to the jury, it

was necessary first to determine whether the plaintiff had sufficient actual knowledge of his right of action to have intelligently prosecuted it more than three years before the commencement of suit. If he did not, the plaintiff still had the burden of proving that the defendant who had raised the limitations defense deliberately concealed from him those material facts needed for intelligent prosecution. If the plaintiff succeeded in that proof, the defendant then had to prove that plaintiff could nevertheless have discovered the necessary facts within three years of the accrual of the right of action through the exercise of due diligence. See Richards v. Mileski, supra, 662 F.2d at 69-72.

Defendants in their motions for a new trial assert that the instructions on the statute of limitations were defective in two respects. First, defendants insist that the jury should have been told that "mere silence by a defendant is not fraudulent or deliberate concealment." Second, defendants argue that the Court erred in instructing the jury that deliberate concealment to serve "law enforcement considerations" defined by the FBI or MPD might--or might not--be the type of concealment against which the equitable doctrine could provide relief. According to defendants, the Court's instruction on that point contradicted "the principle that concealment by a third party may not be attributed to the defendant" and "the principle that the concealment must have been wrongful."

Turning to the second objection first, the instructions did not violate either of the "principles" that defendants recite. The Court did instruct the jury that the defendant or (with respect to conspiracy claims) the defendant's co-conspirators must be proved to have engaged in concealment of the relevant facts. The Court then defined "deliberate concealment" in these terms:

"By deliberate concealment, I mean that defendant or a conspiracy to which a defendant belonged deliberately kept information away from a plaintiff which was material to that plaintiff's claim. It is immaterial whether the defendant or conspiracy kept the material [sic] from plaintiff because the agency employing the defendant or the conspirators believed that law enforcement considerations required concealment, or whether the material facts were concealed for the purpose of impeding plaintiffs' prosecution of their claims."

Such an instruction seemed essential in avoiding unnecessary complexities of motive in cases of this type. Defendants were alleged to have engaged, over a long period of time, in clandestine disruptive activities; at the time they did so, defendants assumed their efforts would remain covert. The secrecy of their operations obviously would have been violated by civil litigation as surely as it would have been by publicity of any other sort. Defendants, if they did engage in deliberate concealment, could thus have rationalized their conduct either as required for a "law enforcement purpose," or to protect themselves from liability in damages. Indeed, because secrecy was so important to their missions, it could have seemed to defendants that "law enforcement considerations" themselves required concealment "for the purpose of impeding . . . prosecution" of civil complaints. Like the schemes in Smith v. Nixon, supra, and Fitzgerald v. Seamans, supra, concealment of defendants' activities in this case was of the essence; it would be impossible for a trier of fact in this case to have determined that the official wrongdoers concealed their operations, not in furtherance of their disruptive objectives, but exclusively to protect themselves from litigation. If, as defendants appear to argue, no concealment for such a "law enforcement" purpose as that they invoked in this case can ever be "wrongful," then there would have been no basis for the determinations in Smith v. Nixon and Fitzgerald v. Seamans that the plaintiffs in those cases

might have been entitled to equitable relief from the statute of limitations. Accepting as true the general proposition that concealment must be "wrongful," see General Aircraft Corp. v. Air America, 482 F.Supp. 3 (D.D.C. 1979), the "wrongfulness" in this case, like that in the Nixon and Fitzgerald cases, consisted of defendants' effort to conceal COINTELPRO and the MPD activities from the public despite the unlawfulness of the FBI and MPD programs.^{26/}

Defendants' other objection, that the Court erred in not instructing the jury that "mere silence" is not fraudulent or deliberate concealment, is also off the mark. To have instructed the jury in this case that "mere silence" might not be "concealment" for purposes of the limitations defense would have risked confusion. The bare concept of silence is inherently difficult to apply. What matters is not some distinction, always difficult to draw, between action and inaction (or "silence") but the deliberateness of a defendant's conduct in foreclosing discovery of the facts a plaintiff would need to prosecute his claim against that defendant. See Smith v. Nixon, *supra*, 196 U.S.App.D.C. at 283, 606 F.2d at 1190. In Richards, it was enough that the defendants had published the false reports and then held their peace, knowing the reports to have been false. See 662 F.2d at 69-70. In this case, defendants assumed false identities as protesters, as students, and as parade coordinators, or they conducted their operations in a manner otherwise calculated to conceal their official status. They maintained, as far as they were able, secrecy about their undertakings. Such conduct is functionally indistinguishable from that in Smith v. Nixon, *supra*. The jury had to be given an

^{26/} Because the instructions required that concealment vel non be attributable to the defendant or (with the conspiracy claims) to the overall design of the conspiracy, they would not have permitted verdict based impermissibly on what defendants call "third party" conduct.

opportunity to decide whether what transpired here was not "mere silence" (as defendants characterize it), but instead was "silence" observed by defendants as a strategy for concealment that prevented a timely claim.

Finally, defendants object to the placement of the limitations issue on the special verdict form as the third principal issue for the jury's decision. According to defendants,--since the statutory defense bars a claim, it should have been placed first on the special-verdict form, ahead of the questions that required the jury to determine whether any plaintiff had been injured. The Court placed the limitations issue after the injury issues in order to ensure that the jury could make its findings on the statutory defense in the manner contemplated by Fitzgerald v. Seamans and Richards v. Mileski without undue confusion. The entitlement to equitable relief may, with respect to a particular plaintiff, vary among the plaintiffs' different claims---as in Richards---or among different defendants--as in Fitzgerald. It would thus have been difficult for the jury to determine which claims were barred, and against which defendants, until it had first isolated for itself the specific allegations each of the nine plaintiffs made. It was therefore better practice to confront the jury with the basic questions of injury vel non first, inasmuch as those questions would, once framed and answered, provide the context for the questions posed by the statute of limitations. In any event, assuming the instructions were not erroneous, there is no indication that the verdicts were affected by the order in which the special form presented the questions for the jury's decision.^{27/}

^{27/} It bears noting that defendants, even though they object to the order of questions on the special verdict form, did not object to the Court's preliminary instructions to the jury that stated the limitations defense after the issue of primary injury. Moreover, it bears noting that the Court advised the jury of the important beneficial purposes of the statute of limitations.

B. The proof regarding the limitations defense

Defendants also argue, in their motions for judgment n.o.v., that the proof adduced at trial was insufficient to entitle plaintiffs to relief from the statute of limitations. According to defendants, there was conclusive evidence that plaintiffs knew of the existence of their rights of action prior to July 16, 1973. Defendants also assert that plaintiffs failed to provide adequate evidence of fraudulent or deliberate concealment, and that the evidence showed that the plaintiffs might through the exercise of due diligence have discovered whatever information they needed to commence suit within three years of their injuries. The Court has concluded, however, that the evidence on the relevant issues of fact was not so clearly in defendants' favor as to entitle them to relief under Rule 50. See Vander Zee v. Karabatsos, *supra*; see also Pan America Petroleum Corp. v. Orr, 319 F.2d 612, 614-15 (5th Cir. 1963).

If a plaintiff has actual knowledge of facts that would have permitted him intelligently to have prosecuted a given claim against a defendant more than three years before he actually filed suit, the claim based on those facts is barred. Fitzgerald v. Seamans, *supra*; cf. United States v. Kubrick, 444 U.S. 111 (1979). In this case there was highly credible evidence, much of it drawn from depositions of plaintiffs at the earliest stages of the litigation, that plaintiffs strongly suspected official misconduct long before they commenced suit. Certain plaintiffs even admitted that they had discussed among themselves the possibility of suing the government, long before July 16, 1973, and prior to the Church Committee hearings or the D.C. City Council investigations. Certain plaintiffs admitted having read articles published in New York and Washington on "secret" FBI efforts to disrupt protest organizations. The articles specifically mentioned the "Head Tax" scheme, one of the COINTELPRO programs that some plaintiffs alleged injured

them.^{28/} Other plaintiffs admitted to strong suspicions, sometimes confirmed by conclusive information obtained by them prior to July 1973, that some of their anti-war associates were in fact undercover police officers. On the other hand, the evidence did not establish precisely how much the plaintiffs who suspected that they were victims of official interference knew about COINTELPRO or the MPD's activities. Plaintiffs' suspicions were, it appeared, more-often-vague-than-specific. They seem to have had more knowledge of official surveillance---itself perhaps not unlawful^{29/}---than of concerted efforts to disrupt their protest activities. And there was ample evidence from which the jury could find that most of the Church Committee's findings provided plaintiffs their first credible account of the conspiracies they alleged.

The jury apparently segregated some claims that it deemed statute-barred from others that it considered not to be barred in a way that lends strong credibility to its overall findings on the statute of limitations issues. See Richards v. Mileski, supra; Fitzgerald v. Seamans, supra. The jury found, for example, that any otherwise valid claims against two of the defendants, the undercover officers Bynum and Markovich, were

^{28/} According to plaintiffs, in 1969 and 1970 FBI agents attempted to exacerbate disagreements among anti-war and civil-rights activists regarding a proposal that anti-war protesters contribute money to help rebuild Washington after the 1968 riots and to support civil-rights causes. At its inception, a proposal originating with protesters of both races in anti-war and civil-rights groups called on all anti-war organizations to contribute various sums, possibly based upon the level of black attendance at anti-war rallies, to civil-rights and "Black Pride" groups for use in the community. Subsequent disputes regarding that so-called "Head Tax" proposal were intense. According to plaintiffs' evidence, FBI agents who learned of the disputes from their informants attempted to inflate the disagreement by planting suggestions that the anti-war groups pay large lump sums to organizations like the Black United Front. Defendants vigorously denied any involvement in such a scheme.

^{29/} See Reporters' Committee for Freedom of the Press v. American Telephone & Telegraph Co., 192 U.S.App.D.C. 376, 593 F.2d 1030 (1978); Berlin Democratic Club v. Rumsfeld, 410 F.Supp. 144 (D.D.C. 1976).

barred by the statute of limitations.^{30/} There was considerable support in the evidence for those findings. By virtue of those two defendants' infiltration of the protest organizations, the plaintiffs who might have been injured by those two defendants associated closely with Bynum and Markovich. The jury could reasonably have concluded that those plaintiffs either had actual knowledge of the two undercover officers' roles, or could through the exercise of due diligence have discovered their roles, long before July 16, 1973. Indeed, there was evidence that at least one plaintiff had positive evidence that Markovich was a police officer prior to July 1973. But the jury's finding that the claims against Bynum and Markovich were statute-barred did not require a finding that claims against the other defendants, even for the same injuries, were statute-barred. The jury could have determined, under the rule in Fitzgerald v. Seamans, supra, that the plaintiffs' actual knowledge of the undercover officers' activity could not reasonably have been expected to give them an awareness of misconduct elsewhere within the Intelligence Division or within the FBI. Far from being evidence (as the MPD defendants argue) of "inconsistent verdicts," the jury's distinction between claims against the undercover officers and the other MPD Intelligence Division defendants thus suggests a careful judgment that should not be disturbed. Finally, it bears noting, in connection with the verdicts against the other defendants, that the jury may well have found certain claims against them to be statute-barred while it found others not to be barred. See Richards v. Mileski, supra. The Court's present task is at an end if it appears from the verdicts and the evidence that the jury could have reasonably found that some

^{30/} With respect to claims by plaintiff Abbott, for example, the jury found that the various claims against Bynum and Markovich were either barred by the statute of limitations, or should not result in an award of damages because the two defendants were, as to those particular claims, entitled to immunity.

claims against a particular defendant were not statute-barred, and that question is easily answered in the affirmative. The jury was entitled to credit the evidence that prior to the spring of 1976 plaintiffs had no awareness, nor could they be expected to have had awareness, of the central connections among the various attacks upon them.

Defendants' challenge to the proof regarding concealment and due diligence is even less powerful than their assertion that plaintiffs had actual knowledge of the material facts more than three years before the commencement of suit. Plaintiffs had the burden of proving concealment of the material facts and they offered considerable evidence in support. There was evidence of the scope and intensity of the FBI's attempts to ensure that COINTELPRO remained secret. There was evidence that the District of Columbia had destroyed a body of Intelligence Division documents in the 1970's and thereby virtually obliterated much of the record of the activities of the Division. The evidence, taken as a whole, thus supported the jury's findings that plaintiffs could not have discovered the material facts needed to prosecute particular claims. Here, too, the jury may have found that, as to particular claims---the "Head Tax" program, for example---a person could through the exercise of due diligence have discovered the facts needed for suit. But even if the evidence required such a finding on the due-diligence issue as to a particular claim, other claims could survive. Assuredly, the evidence did not compel the jury to find that all the claims a plaintiff had against a particular defendant were discoverable through the exercise of due diligence. The jury's ultimate resolution of the due-diligence issues presented to them therefore will stand.

IV. Limited Official Immunity

All of the individual defendants sought benefit of the

limited official immunity for law-enforcement personnel recognized in Pierson v. Ray, 386 U.S. 547 (1967), and later decisions. In their present motion the MPD defendants assert that the evidence compelled a verdict that many of them were immune. The FBI defendants seek relief on the immunity issue only in their motion for a new trial, in which they suggest that the terms the Court used on the special-verdict form to state the immunity question were "inadequate."

The FBI defendants' objection to the special-verdict form's statement of the immunity issue borders on the frivolous. In lengthy instructions that apparently are not now challenged by any defendant, the Court explained to the jury the criteria for qualified official immunity, and indicated how the jury should record the verdict they reached on the immunity claims. Defendants argue, however, that the Court should have included on the special-verdict form a description of "the concept of good faith immunity." Asserting that "[t]he concept of immunity from liability is not one which a jury of laymen could be expected readily to understand," defendants insist that the special-verdict form should have asked: "Did the defendant believe reasonably and in good faith that his actions were proper?" The purpose of the special-verdict form was to provide a mechanism for the jury to record its findings on the question put to it by the Court; the purpose of the instructions, in whose formulation defendants participated, was inter alia to explain the concept of immunity. The criteria for official immunity would, moreover, have required a summary on the special verdict form different from that proposed by defendants. A belief that one's actions were "proper," even if reasonable and characterized by "good faith," obviously will not avail a defendant who does not act within the scope of his authority. See Procunier v. Navarette, 434 U.S. 555, 571 (1978) (Stevens, J., dissenting); Wood v. Strickland, 420 U.S. 308, 322 (1975). Of course, the issue of

whether these defendants acted beyond the scope of their authority---that is, "for reasons unrelated to the performance of their duties," see 434 U.S. at 571---was clearly not as important in this case as the question whether they acted with a reasonable and good-faith belief in the propriety of their actions. But the Court had no basis in this case for withdrawing that issue from the jury in the wording of the special-verdict form. Defendants' proposed formulation might have had that consequence and, ~~in any~~ event, their statement of the immunity issue does not appear to the Court to possess any material advantage for a properly-instructed jury over the formulation the Court employed.

The MPD defendants argue that, because many of their activities were lawful and specifically authorized by the regulations governing the work of the Intelligence Division, and because they did not know about COINTELPRO, the jury was required to grant them immunity for any injuries they inflicted on plaintiffs in the exercise of plaintiffs' First-Amendment rights. See Procunier v. Navarette, supra. There was considerable evidence at trial touching upon the immunity issue. Plaintiffs offered evidence tending to show that MPD officers, some of them defendants or officers acting in concert with defendants, burglarized offices of organizations in which plaintiffs were active, attempted to disrupt peaceful protest meetings, and destroyed machinery used by plaintiffs' organizations to reproduce political leaflets. Plaintiffs also offered evidence of regular contacts between Intelligence Division personnel and FBI officials participating in design and execution of COINTELPRO schemes; such evidence could have provided a basis for a finding that the MPD defendants knew enough about COINTELPRO to know that the information they gave the FBI would be used to disrupt and discredit plaintiffs' political activities. Defendants, however, denied any involvement in any activity not specifically authorized by law or

Intelligence Division practice, and denied any knowledge of any aspect of COINTELPRO. Based upon that evidence, the jury found some defendants to be immune on certain claims of various plaintiffs, and denied immunity on other claims. The Court cannot say that the evidence that all defendants believed their conduct to be lawful, and that such a belief was reasonable under the circumstances confronting defendants, was so decisive that it would permit the Court to overturn the verdicts. In particular, the strong evidence of burglary committed by MPD officers, and the evidence that various defendants knew of the burglary, contradicted defendants' claims that they believed in good faith and with good reason that their conduct was lawful: no regulation of the MPD relieved the Intelligence Division from the requirement of search warrants.

The jury did, on the other hand, find some MPD defendants to be immune from liability for injuries they inflicted on some plaintiffs. The jury's findings that certain defendants should be immune from liability on certain claims was not, as the other MPD defendants now argue, inconsistent with the jury's other findings that different defendants were not immune.^{31/}

^{31/} The jury found defendants Bynum and Markovich to have been participants in a section 1985(3) conspiracy, and yet also accorded them immunity. Defendants, while arguing that the verdicts were inconsistent because some of them were accorded immunity while others were not accorded immunity, have not suggested that the verdicts were infirm because Bynum and Markovich were found both to have been knowing participants in an actionable conspiracy and also entitled to immunity. The jury assuredly trod a narrow line in returning these verdicts. There is, however, adequate basis in the evidence for the distinction the jury drew and, perhaps for this reason, the defendants have not assigned this point as error. The evidence did not compel a finding that Bynum and Markovich acted from malice. They were at the end of the chain of command. There was evidence and inference from which the jurors could rationally conclude that Bynum and Markovich were entitled to rely for approval of their actions upon the direct orders of their superiors. Bynum and Markovich possibly may have shared the discriminatory animus required for participation in the conspiracy, and joined fully in (footnote continued to next page)

Defendants like Bynum and Markovich, the two defendants whom the jury found most often to be immune from liability in damages offered detailed justifications for their conduct during their testimony. It was not unreasonable for the jury to see a difference in the belief those officers maintained concerning the lawfulness of their work, and in the reasonableness of that belief, from the belief the other, higher-ranking defendants within MPD may have possessed. Moreover, the jury also found the other MPD defendants, with the exception of defendants Wilson and Herlihy, to be immune from at least some of the claims against them by particular plaintiffs. Wilson and Herlihy were the highest-ranking officers in the MPD group of defendants. Wilson and Herlihy may also have been in the best position to know the law and the facts that might have indicated that the MPD's activities were violating plaintiffs' First-Amendment rights. The Court cannot say that the jury's possible recognition of such a hierarchy of responsibility was insupportable on the evidence adduced at trial. The plausibility of a defendant's claim that he did not know and should not have known about the MPD's involvement in COINTELPRO, or that he reasonably and in good faith believed his own conduct and that of the Department to be lawful, might well depend on the defendant's position with the MPD and within the Intelligence Division.

V. Admissibility of plaintiff's exhibits

Portions of plaintiffs' proof of their claims against the FBI and MPD defendants came from FBI documents obtained either in

(continued from preceeding page)
the conspiracy's objectives, and yet could not be reasonably expected (given the peculiar circumstances of their involvement in the MPD's activities) to have known their conduct was unlawful or improper under the First Amendment. Compare Griffin v. Breckenridge, supra, with Wood v. Strickland, supra, and Bogard v. Cook, 586 F.2d 399, 411 (5th Cir. 1978). Particularly because defendants do not suggest this point as grounds for challenging the verdict, the Court will not disturb the verdicts on this matter.

discovery in this case or through invocation of plaintiffs' rights under the Freedom of Information Act, 5 U.S.C. § 552. In their motion for a new trial defendants object to the admission of certain documents that, in defendants' words, "did not pertain to any defendant, but which could inflame or mislead the jury." See Fed.R.Evid. 401-03. Defendants' specific objections pertain to documents that described FBI attempts to discredit leaders of the Black United Front and to exacerbate difficulties experienced by plaintiffs and other protesters in their efforts to coordinate joint activities of the Black United Front and several anti-war organizations. The Court will, in addressing this ground of defendants' motion, also summarize the other main evidentiary problems in the case, so that defendants' present objections may be seen in context.

During trial, the FBI defendants objected to submission to the jury of excerpts from the Final Report of the Church Committee that described the COINTELPRO operation. The parties reached some agreement about the portions of the Report that might be submitted to the jury. Adopting the view of Rule 803(8)(c) endorsed by this Court in United States v. American Telephone & Telegraph Co., 498 F.Supp. 353, 359-60 (D.D.C. 1980), the Court admitted other segments of the Church Committee's reports proffered by plaintiffs and not covered by stipulation, some of which took the form of factual "evaluative reports" rather than mere compilations of data. See United States v. American Telephone & Telegraph Co., *supra*; S.Rep. No. 93-1277, 93d Cong., 2d Sess. 18, reprinted in [1974] U.S. Code Cong. & Admin. News 7064. While the admission of "evaluative reports" under Rule 803(8)(c) appears to have been disfavored by the report of the House Judiciary Committee on Rule 803(8)(c), "[e]xtrinsic materials indicate that the Rule is most appropriately considered by following the Senate Committee's position." See 498 F.Supp. at 359. See also Robbins v. Whalen,

653 F.2d 47 (1st Cir.), cert. granted, 50 U.S.L.W. 3453 (Dec. 1, 1981). The Court thus permitted the jury to have the Church Committee's findings regarding the organization of COINTELPRO, the Committee's summary of COINTELPRO's basic target groups (both drawn directly from internal FBI documents), and similar materials. The segments of the Church Committee Report submitted to the jury reflected adherence to appropriate standards of scholarly responsibility, investigative integrity, and trustworthiness. Indeed, the quality of the Report is perhaps evidenced by the fact that similar portions of the same Report have been relied upon by this Court and in other circuits for the background they have provided in other cases concerning COINTELPRO.^{32/} See, e.g., Sims v. CIA, 642 F.2d 562, 564 (D.C.Cir. 1980).

The Court also admitted, over defendants' objections, portions of the sworn testimony given by various MPD officials in the course of an investigation of Intelligence-Division wrongdoing, conducted in 1975 and 1976 by Assistant Chief Melvin I. Winkelman and by the United States Attorney for the District of Columbia. The FBI defendants particularly objected to admission of Plaintiff's Exhibit 38, which was an excerpt of a sworn statement by former MPD employee Charles Marcum in which Marcum told the investigators of a covert MPD entry at the offices of protest organizations in which certain plaintiffs were

^{32/} To the extent defendants' objection at trial was based, not on the untrustworthiness of the Report or its assertedly "evaluative" quality, but on some prejudicial effect on the defense of the claims against them, it was not well-taken. The Report was clearly relevant to the claims plaintiffs made against the FBI defendants regarding their participation in COINTELPRO. The Court instructed the jury on the requirement that a defendant be proved to be personally liable, either through participation in a conspiracy or through non-conspiratorial activity, and on plaintiffs' burden of proving that liability as to any defendant they charged with responsibility for their injuries. Rule 403 itself creates a presumption against exclusion of relevant evidence. If deemed an objection under Rule 403, then defendants' objection to the Church Committee excerpts the Court found otherwise admissible under Rule 803(8)(c) cannot overcome that presumption. See Miller v. Poretsky, 193 U.S.App.D.C. 395, 408, 595 F.2d 780, 793-94 (1978) (Robinson, J., concurring).

active. According to Marcum's testimony, MPD officers told him they delivered the materials they took from those offices to FBI agents involving in COINTELPRO. In his testimony, Marcum described his own participation in the break-in, and recounted for the investigators reports he had heard from others that a box of documents taken from the offices found their way to the FBI. The Court admitted so much of the excerpt as constituted an admission against interest by Marcum---who was unavailable for testimony in this action---but excluded from the statements it admitted any segment that consisted of double hearsay. See Fed.R.Evid. 804(b)(3), 805.

The FBI defendants also objected at trial to admission of segments of various plaintiffs' FBI files, which were prepared by a number of FBI agents over the course of many years while plaintiffs were under official surveillance. They press that objection in the present motion as well, on the ground that "[n]one of the federal defendants were directly involved in the investigation of any plaintiff," so that the admission of the plaintiffs' files would "permit the jury to consider, and potentially hold defendants liable for, investigative activity which the federal defendants would not have been involved in and would not have known about." The evidence showed that defendants, as agents with roles in implementation of COINTELPRO, were expected to use all information possessed by the Bureau to develop effective programs of disruption and harrassment; indeed, the FBI memoranda that launched COINTELPRO in 1967 and 1968 instructed agents to maintain current files on the targets of COINTELPRO to enhance the effectiveness of the program of disruption. See Plaintiffs' Exhibits 1-3.^{33/} Consideration of plaintiffs' files by the jury could have enhanced the jury's understanding of defendants' efforts to interfere with their

^{33/} Exhibits 1-3 appear in Appendix II.

First-Amendment rights in the manner intended by COINTELPRO. The files were thus admissible, on their face, under Rule 401.

Defendants argue, however, that consideration of the files would also have had an unfairly prejudicial effect. It is true, of course, that plaintiffs did not establish---nor could they have---that the segments of the files proffered for the jury were all segments that one defendant or another used against a plaintiff in the course of-COINTELPRO.---But the Court carefully instructed the jury that defendants could be liable only for their own action and for their own knowing participation in a conspiracy, and that intelligence-gathering, including so-called "non-criminal surveillance," was not in itself actionable in this case. See Reporters's Committee v. American Telephone & Telegraph Co., supra; Berlin Democratic Club v. Rumsfeld, supra; cf. Jones v. Unknown Agents of the Federal Election Com'n, 198 U.S.App.D.C. 131, 613 F.2d 864 (1979), cert. denied, 444 U.S. 1074 (1980). A court must not exclude relevant evidence when it appears confusion or prejudice can be avoided by instructions. In the present case, to have committed the error defendants suggest, the jury would have had to ignore the Court's instruction that intelligence-gathering and information retention were not a basis for liability in this case. Given the documents' probative value in demonstrating the character of defendants' interference in plaintiffs' activities, there was no justification for exclusion under Rule 403.^{34/}

Defendants also renew in their motion for a new trial an objection to admission of Plaintiffs' Exhibits 23, 24, 25, 31, and 31A. Exhibits 23, 24, and 25 included a copy of a leaflet, anonymously authored by an FBI agent who was not a defendant, that purported to come from a white anti-war protester angered by

^{34/} The Court admitted only segments of plaintiffs' files, and defendants appear to make no suggestion that the evidence was cumulative.

demands, attributed to the Black United Front, that the anti-war protesters pay blacks to cooperate in various anti-war activities in which some white plaintiffs participated.^{35/} The other pages of these three exhibits were FBI memoranda that discussed possible use of the false leaflet and approved its distribution. In Exhibit 24, which bore the names of defendants Brennan and Moore as either originators or addressees, the Director gave permission to distribute the leaflet, whose objective was, according to the memorandum admitted as exhibit 23, "to widen the rift between the New Mobilization Committee . . . and the Black United Front." Exhibit 25 apparently accompanied a batch of the leaflets given to the WFO, whose agents were instructed to distribute them to appropriate people in Washington in a manner concealing Bureau involvement. All the FBI defendants denied having ever seen the leaflet or the memoranda, or knowing anything about the leaflet. The Court admitted the materials, however, because plaintiffs offered relatively credible evidence that, given the organization of COINTELPRO within the FBI, such documents would have probably required some review by various defendants; the strongest evidence of such a pattern was, of course, the presence of two defendants' names on the critical document approving distribution of the leaflet. The exhibits were highly probative of several plaintiffs' claims of injury against several defendants. Despite its arguably inflammatory language and graphics of Exhibit 23,^{36/}

^{35/} This was the so-called "Head Tax" scheme. See note 29 supra.

^{36/} Without attempting to suggest which passages of Exhibit 23, if any, would have particularly outraged a reader, the Court will note that the document is replete with racist and scatological references. The leaflet calls one leader of the Black United Front "nothing but a black blackmailer," and warns, "Mr. Moore and his pack or herd or pride or whatever you call a group of bloodsucking animals, are in for a shock." The leaflet then proposes, "[I]f they must get something in return for their non-violence towards NMC during these days of demonstrations, give them BANANAS [sic] - all they can eat."

which appears to have been intended to portray its author as a white racist who had contempt for the Black United Front, the leaflet could not be withheld from the jury. Defendants remained free to argue that they should have no responsibility for the leaflet, and it was for the jury to decide the ultimate questions of fact raised by that defense.

Exhibits 31 and 31A included another anonymous leaflet, attributed to a member of the National Steering Committee of the New Mobilization Committee, but in fact prepared by the FBI's New York Field Office. That leaflet excoriated the New Mobilization Committee for its insensitivity to the needs of the Black United Front. Exhibit 31 indicated that the leaflet had a purpose similar to that of the leaflet supposedly authored by the white racist anti-war protester and admitted as Exhibit 23. As with the "racist" leaflet, the New York agents who originated the second leaflet proposed that members of the WFO distribute it to best effect in the Washington area. Like the "racist" leaflet, this leaflet was sent to FBI headquarters for approval by the Director. The evidence of involvement by defendants Moore and Brennan in execution of the proposal from New York office is, however, only circumstantial: their names do not appear on the memorandum that originated in New York transmitting the leaflet, and plaintiffs did not proffer a memorandum that, like exhibit 24, evidenced headquarters approval of the proposal from the New York office. On the other hand, plaintiffs offered credible evidence that Brennan and Moore had routine oversight of proposals like that from the New York office, and there was evidence that materials routed to them in the course of COINTELPRO ordinarily did not mention them by name, but were simply referenced "COINTELPRO" and addressed formally to the "DIRECTOR, FBI." Plaintiffs also argued that defendants assigned

to WFO might have participated in plans to distribute the leaflet prepared in New York, since the New York agents clearly intended that they do so. The proof of liability for any injuries attributable to exhibit 31A was also circumstantial. But plaintiffs' theory of defendants' involvement, at least at the headquarters level, was consistent with the strong evidence of the headquarters defendants' involvement in similar COINTELPRO schemes. And, if the jury believed plaintiffs' assertions that the headquarters defendants had been involved in consideration of exhibit 31A, then exhibits 31 and 31A would have been probative of the scope and character of the conspiracy plaintiffs alleged. Moreover, the content of exhibits 31 and 31A was not so inherently offensive as significantly to risk distortion of the jury's sense of fairness. As its base the only ground for defendants' objection to admission of exhibits 31 and 31A was that proof of their participation in the scheme the exhibits described was circumstantial rather than direct. Article Four of the Evidence Rules does not preclude introduction of circumstantial proof. Cf. Miller v. Poretsky, supra. The probative value of the exhibits outweighing any possible prejudicial impact, the Court admitted them, and cannot now say that their admission is a ground for a new trial.

VI. The motion of defendant Jones

In a motion for judgment n.o.v. stating grounds unique to his defense, defendant Jones renews his argument before trial that he was entitled to involuntary dismissal of the claims against him under Fed.R.Civ.P. 41(b) or, in the alternative, to a continuance of trial on the claims against him. In the present motion Jones contends that plaintiffs so substantially delayed service of the amended complaint naming him as a defendant that he was prejudiced in his defense, and that dismissal under Rule 41 should have occurred before trial even in the absence of

affirmative evidence of prejudice.

Jones was not named as a defendant in the first complaint filed by plaintiffs in July 1976. By 1977, however, once discovery had begun, plaintiffs learned of Jones' role in the "internal security" activities of the WFO, and apparently believed him to have injured them in connection with COINTELPRO effort at the WFO. Accordingly, plaintiffs included Jones as one of the FBI defendants named in the amended complaint filed late in 1977. Plaintiffs thereupon made several attempts---attempts whose good faith is not questioned here---to serve Jones with the papers. First plaintiffs attempted service of Jones at the WFO; later they left the papers at his residence in the Virginia suburbs. In December 1978, Jones, pursuant to 28 C.F.R. § 50.15 (1977), requested appointment of counsel for him by the Department of Justice. The Department, granting the request, assigned the lawyer who was representing all the other FBI defendants in the case to Jones.^{37/}

In 1979, defendant Jones, together with defendant Wilfred R. Schlarman, moved for dismissal of the claims against them. As Judge Pratt, to whom this case was then assigned, summarized their motion, defendants asserted that, as to themselves, "service of process was not effected upon a person of 'suitable age and discretion' at their homes in accordance with Rule 4(d)(1) of the Federal Rules of Civil Procedure. For both defendants, service was not made upon the defendants personally or upon any other individual." Hobson v. Wilson, Civil Action No. 76-1326 (D.D.C., Nov. 9, 1979), slip op. at 7. Judge Pratt granted the motion without prejudice to fresh attempts to serve process. See id. at 8; Local Rule 1-14. After the case had been reassigned to the trial judge in September 1980, the Court

^{37/} That lawyer has represented all the FBI defendants since the beginning of the case.

directed the parties to "propose a practical solution for the problem posed by the failure to effect service on a number of defendants," including defendant Jones, who had still not been served. See Order of November 14, 1980. At status calls held in late 1980 and in January 1981, the Court discussed the failure of plaintiffs to serve Jones and other defendants; however, counsel for the "served" FBI defendant declined to take any action, claiming not to represent those unserved defendants and because those defendants "are not under the personal jurisdiction of the Court." See Letter of David H. White (dated November 25, 1980), filed as Attachment to Order of December 8, 1980.

On June 21, 1981, plaintiffs perfected service of process upon defendant Jones after having successfully subpoenaed him for a deposition in this case earlier in 1981. Under Pretrial Orders then in effect, discovery in the case was to terminate at the end of July, 1981, but defendant Jones did not seek an extension of the discovery period.^{38/} Instead, on August 30, 1981, defendant Jones moved for dismissal of the claims against him inter alia for failure to prosecute. Jones argued he would be unfairly disadvantaged by trial in the fall of 1981, and that plaintiffs' failure to serve him in a more timely fashion was willful and inexcusable. On October 29, 1981, the Court denied Jones' motion to dismiss. Addressing the claim under Rule 41, the Court wrote in the Memorandum of October 29:

Jones' suggestion that the claims against him should be dismissed for failure to serve process in a timely fashion must . . . be rejected, inasmuch as he will suffer no prejudice if plaintiffs are precluded from raising any claim against him not stemming from acts already involved in the litigation against other defendants who are represented

^{38/} Plaintiffs, in connection with discovery problems unrelated to Jones and his defense, sought and obtained from the Court several extensions of the discovery termination date.

by Jones' counsel, and who were with Jones in the Federal Bureau of Investigation at the time of his allegedly unlawful conduct. Counsel for Jones is invited to submit with his pretrial brief an appropriate order concerning claims to be precluded.

Hobson v. Wilson, Civil Action No. 76-1326 (D.D.C., Oct. 29, 1981), slip op. at 5.

Jones' FBI counsel never submitted the proposed order sought by the Court. Instead, on November 17, 1981, Jones moved for reconsideration of the decision of October 29, 1981, and FBI counsel sought to withdraw from representation of Jones. The latter motion was expressly premised on a belief, supposedly based upon the language from the October 29 Memorandum quoted above, that the only reason the Court denied the Rule 41 motion was the fact that Jones shared FBI counsel with other previously-served defendants. At a status call on November 20, 1981, another member of the District of Columbia bar made a limited appearance on Jones' behalf, in the event the Court granted FBI counsel's motion, and indicated, in papers filed on the eve of trial, an intention (if he entered the case as counsel for Jones) to file a third-party complaint against the United States and to seek continuance of the trial date set in the Court's Order of August 14, 1981. The Court denied Jones' FBI counsel's motion to withdraw, informed counsel who made the limited appearance that he had leave to enter a general appearance and to appear on Jones' behalf at trial, and rejected the motion for reconsideration of the October 29 Order. Jones' FBI counsel still did not file the proposed order sought in the October 29 Order, and counsel who had made the limited appearance on Jones' behalf appeared not to take an active role in court on Jones' behalf.

In the present motion, Jones, through his FBI counsel, renews his argument that dismissal under Rule 41 was required, and asserts that denial of his motion prejudiced his defense. In

the relatively unusual circumstances of this case, it may well be that plaintiffs' counsel have displayed unusual indifference to the requirements of service of process. But the Court has a larger responsibility to ensure fair and orderly trial. A defendant, positioned as defendant Jones was within the group of FBI defendants and possessing actual knowledge of the claims against him, should not exploit the technical defects of a plaintiff's service of process to force upon the Court the difficult question of whether to bar suit against him, or whether to grant a continuance whose practical impact would be tantamount to the barring of suit. Jones' argument now appears to be that nothing short of complete dismissal---or an extensive continuance---would have sufficed, because, from the time he was dismissed from the action in late 1979 until service was perfected in the spring of 1981, he was entitled to assume plaintiffs had lost interest in prosecution of their claims against him. But the extent of the delay in service in this case requires the Court to determine, with some precision, whether Jones was in fact prejudiced by the late service of papers. See Messenger v. United States, 231 F.2d 328 (2d Cir. 1956). In a case such as this, involving common counsel and a movant who was well-placed to know of the progress of the litigation and perhaps to be involved in the defense, the Court should "assess the prejudice vel non suffered by [the movant] rather than . . . the degree of the plaintiff's 'neglect' as to that defendant." Bersch v. Drexel Firestone, Inc., 389 F.Supp. 446, 464 (S.D.N.Y. 1974), rev'd in part on other grounds, 519 F.2d 974 (2d Cir. 1975); see also Preston v. Mendlinger, 83 F.R.D. 198, 199-201 (S.D.N.Y. 1979). And, since defendant's argument is based ultimately on a claim of unfair surprise, the Court ought to examine carefully the steps Jones took once he was served with the papers in June 1981. His claim that he lost the opportunity to engage in discovery is difficult to maintain, since he did not

either seek discovery beyond that already pursued by his fellow FBI defendants or request an extension of the discovery period to plan and then obtain additional discovery. And his claim that it was in a larger sense "unfair" to have put him to his proof on claims plaintiffs had taken years to develop ignores his own failure to pursue the Court's proposal in October 1981 that various claims against him be precluded. It also seems improbable that Jones could not have anticipated, prior to the eve of trial, the need to seek a continuance of trial on the claims against him.

The Court cannot find in the circumstances of Jones' defense as it developed at trial the kind of prejudice that could have justified the extreme remedy that Rule 41 sometimes permits. The policies of fairness embodied in Rule 41 must be enforced. See Link v. Wabash Railroad Co., 370 U.S. 626 (1962); Anderson v. Air West, 542 F.2d 522 (9th Cir. 1976). But federal civil procedure favors disposition of claims on their merits. Keegel v. Key West Trading Co., 200 U.S.App.D.C. 319, 320-21, 627 F.2d 372, 373-74 (1979). It was not apparent from the trial that defendant Jones was in any way prejudiced in his defense: like the other four FBI defendants, Jones was ably represented by the counsel appointed for him in December 1978 by the Department of Justice. While the nature and degree of each FBI defendant's responsibility for the injuries plaintiffs alleged surely differed, Jones, as a litigant, appears to have fared no better, and no worse, than the other FBI defendants. There was no adequate basis shown for dismissal of the claims in October 1981; there was no basis for a continuance of trial shown in November 1981. And there is no basis now for grant of judgment n.o.v. to defendant Jones.

VII. Plaintiffs' Contact with Dismissed Jurors

During the lengthy trial of this action the Court had occasion to discharge several members of the panel selected for

service on the jury and to seat alternates in their places. It appears that, following the close of the evidence on December 14, 1981, but prior to delivery of closing arguments to the jury, one of counsel for plaintiffs contacted a person who had sat on the jury in the early days of trial but who had been discharged on December 3, 1981. Plaintiffs' counsel apparently discussed with the dismissed juror her view of the case and the evidence on the telephone on the afternoon of December 14.^{39/} On December 18, 1981, the Court examined the dismissed juror in proceedings on the record in Chambers and invited questions from counsel. The next day the lawyer for plaintiffs who had contacted the jurors made a statement on the record, and the Court again invited questions from counsel. FBI defendants thereupon moved for a mistrial, and the MPD defendants later joined in the motion. The motion was denied. In their present motions all defendants seek a new trial based upon plaintiffs' contact through their counsel with the discharged jurors.

It appears from the statements of plaintiffs' counsel and the discharged juror whom they succeeded in contacting and questioning that that discharged juror freely offered her opinions regarding the evidence she had heard and also described the opinions she perceived the other members of the panel to hold. The discharged juror, in having the conversation with plaintiffs' counsel, must have misunderstood or forgotten the Court's instructions to her at the time of her discharge, that she not discuss the case with anyone "on the outside." Plaintiffs' counsel may have also misunderstood or forgotten the Court's instructions to the discharged juror. The matter is now the subject of an inquiry by the Disciplinary Committee of this

^{39/} plaintiffs' counsel did not inform the Court or opposing counsel of her intention to contact the dismissed juror. It was only when another dismissed juror informed staff of the Court in the Jury Lounge that plaintiffs' counsel had unsuccessfully tried to reach him on the telephone that the matter came to light.

Court, initiated by the Assistant Attorney-General for the Civil Division. The question here must be whether plaintiffs' counsel's disregard of the Court's instruction to the dismissed juror, and of the general standards that should control any contact by counsel with jurors in any case,^{40/} constitutes grounds for a new trial. The rule that should govern remains that established in Mattox v. United States, 146 U.S. 140, 147-50 (1892), which sets up a presumption that any contact of this character should invalidate a verdict unless its harmlessness can be shown. "A trial judge should not hesitate to grant a new trial where there is any significant doubt whether the presumption of prejudice has been overcome." Ryan v. United States, 191 F.2d 779, 781 (D.C.Cir. 1951), cert denied, 342 U.S. 928 (1952).

Leaving to the appropriate forum the question of whether disciplinary action is indicated in this case, the Court has determined that a new trial should not be granted on this ground. The parties had rested at the time of the contact with the dismissed juror. There was no longer an opportunity for plaintiffs to have conformed their proof to the advice of the dismissed juror. The only direct effect her advice could have had would have been on design of closing statements, and perhaps in final argument to the Court regarding the Court's instructions to the jury. The information plaintiffs gained had no impact at all on the Court's instructions, and apparently no effect on plaintiffs' requests in connection with the instructions. The only discernible effect the conversation with the discharged juror appears to have had on plaintiffs' closing was on plaintiffs' discussion of the statute-of-limitations issues in their closing. Perhaps because the dismissed juror had told plaintiffs' counsel that she believed the limitations defense to

^{40/} See Local Rule 1-28.

be difficult to understand, plaintiffs' counsel took pains to emphasize the basic simplicities of the defense. That is, however, the only possible effect on the trial that the Court's inquiries have disclosed, and even it is highly speculative. And there is no suggestion that counsel's argument on the limitations was in itself inappropriate in any concrete way. Defendants' counsel had ample opportunity to answer plaintiffs' argument on the limitations issue, and they did so. Even if it is assumed that plaintiffs' counsel formulated their closing argument, perhaps particularly that touching the limitations defense, with the discharged juror's comments in mind, the Court finds there was no prejudicial impact on the jury's verdicts stemming from the incident.

VIII. Damages

The jury, having found particular defendants liable to the plaintiffs, awarded sums of compensatory and punitive damages amounting to \$93,750 to each of five plaintiffs and \$81,062.50 to each of the other three prevailing plaintiffs; individual defendants' liability ranged from \$75,000 to \$9,375. The jury's award may be summarized on the following table, which identifies the three prevailing plaintiffs who received the lesser sum as "Group 1 Plaintiffs" and the five who received the greater sum as "Group 2 Plaintiffs."

	Each Group 1 Plaintiff (Booker, Eaton, Hobson)	Each Group 2 Plaintiff (Abbott, Bloom, WPC, Pollock, Waskow)
Brennan*	\$9375	\$9375
Moore*	\$7500	\$7500
Jones*	\$5625	\$5625
Grimaldi*	\$4687.50	\$4687.50
Pangburn*	\$5625	\$5625
Wilson*	\$5625	\$5625
Herlihy*	\$4687.50	\$4687.50
- Acree	----	\$2562.50
Scraper	----	\$3125
Jagen	----	\$2562.50
Suter	----	\$2562.50
Mahaney	----	\$1875
District of Columbia	\$37973.50	\$37937.50

*Award includes punitive damages (one-third of total award). See page 5 supra.

The sharp graduation in the amounts the jury fixed reflects the jury's judgment, based upon the Court's instructions and the evidence, regarding the extent of the injury suffered by plaintiffs and the measure of each defendant's responsibilities for those injuries.

In the present motions defendants make numerous objections to the jury's awards. Defendants argue that the awards were excessive and against the weight of the evidence; that the awards reflect an impermissible mathematical proportionality that reveals their arbitrariness; that punitive damages should not have been awarded at all; and that the award against the District of Columbia was wholly out of proportion to any other awards and thus was particularly arbitrary. In addition, the FBI defendants assert that the Court erred in not instructing the jury that the United States itself would not pay an award against the federal defendants. The District of Columbia defendants also argue that the Court's instructions and the special-verdict form permitted

the jury to grant an impermissible "multiple" award against several defendants for a single injury, and therefore allowed double, or more than double, recoveries.

The Court's instructions on compensatory damages were based principally on the two critical decisions of the Court of Appeals on First-Amendment damages: Tatum v. Morton, 183 U.S.App.D.C. 331, 562 F.2d 1297 (1977), and Dellums v. Powell, 184 U.S.App.D.C. 275, 566 F.2d 167 (1977), ~~cert. denied~~, 438 U.S. 916 (1978). As the Court advised the jury, compensatory damages embrace proven out-of-pocket damages and a fair and reasonable amount for any proven physical pain, mental suffering, and for the intangible, though nonetheless real, loss of First-Amendment rights of speech, assembly, protest, and association. Dellums v. Powell, supra, 184 U.S.App.D.C. at 302-04, 566 F.2d at 194-196; Tatum v. Morton, supra, 183 U.S.App.D.C. at 334-37, 562 F.2d at 1281-85; id. at 1285-87 (Wilkey, J., concurring). The Court took pains to inform the jury that the burden of proof of such actual injury as could be a basis for compensatory damages rested upon each plaintiff. Cf. Carey v. Piphus, 435 U.S. 247, 262-65 (1978); see also Halberin v. Kissinger, 196 U.S.App.D.C. 285, 300 n.100, 606 F.2d 1192, 1207 n.100 (1979), aff'd by an evenly divided Court, 101 S.Ct. 3132 (1981). The Court also instructed the jury that, "insofar as it seeks to compensate intangible losses of First-Amendment rights, your award must be proportioned to the loss actually suffered by a plaintiff" whose exercise of First-Amendment rights the defendant was found to have impeded. See Dellums v. Powell, supra.

Turning first to the objections to the instructions and to the verdict form, there is no merit in the federal defendants' claim that they were entitled to an instruction that the United States would not pay a judgment against them. There was no trace of evidence, in plaintiff's case or in defendants' case, regarding possible disposition of judgments against these active

and retired employees of the United States, and therefore no basis for any instruction on that matter. Defendants were entitled to offer proof of the hardship an award might cause, and to argue hardship to the jury; to a limited extent, they attempted both, and the jury's awards may reflect a judgment regarding those hardships to the extent of the evidence on the issue. Nor is there merit in the District of Columbia defendants' suggestion that the instructions and verdict form permitted "multiple" recoveries. In cases of this type, there may be some danger of a duplicative award. See Dellums v. Powell, *supra*, 184 U.S.App.D.C. at 317-18, 566 F.2d at 209-10 (Leventhal, J., concurring). The Court therefore instructed the jury to divide the sum it fixed to compensate an injury among all those it found responsible for it, and the special verdict form, with its separate spaces for each defendant, would have dissolved any belief on the jury's part that the damages should not be so apportioned.

The defendants' objection to "rigid arithmetical calculation" in the jury's award of damages possesses, in the abstract, no weight at all. The jury was entitled to apportion damages in accordance with the instructions. Defendants cannot now presume to impeach the awards against them because they reflect particular ratios, or seem to defendants to have been derived in a particular manner. The only question is whether those verdicts were excessive, or obviously irrational in some other way that would entitle defendants to relief from them.^{41/} The Court turns to that question now, discussing first the jury's award of compensatory damages and then its award of punitive damages.

^{41/} Defendants point variously to the asserted "disproportionality" of the award against the District government and the equality of the awards against two federal defendants as indications of irrationality. See pp.60-61 *infra*.

A. Compensatory Damages

Plaintiffs offered extensive evidence of efforts by defendants within the FBI and the MPD to impede the exercise of First-Amendment rights. The evidence included evidence from which the jury could have reasonably concluded that plaintiffs were in fact impeded in the exercise of those rights. The jury was required by the instructions, however, to limit its award of compensatory damages to the injuries actually suffered by plaintiffs in the exercise of their rights; an attempt by defendants to injure the plaintiffs in the exercise of their rights that did not succeed could not have been the basis for an award of compensatory damages, and the award based upon a successful attempt to impede First-Amendment activities had to be measured by the degree of defendants' success. Apart from the intrinsic difficulties of placing some monetary value on rights that are so often said to be "priceless," the jury thus had a difficult task in assessing the intangible injuries the plaintiffs suffered: it had to decide how far defendants' plans to disrupt and discredit plaintiffs' activities actually succeeded. A Court must be reluctant to disturb a jury's work of this kind. Valuation of political and dignitary rights is peculiarly within the competence of a jury. Damage actions by political figures for official abuse of power were well-known at the time when our Constitution and the First Amendment were written, and they were tried to juries. See, e.g., Wilkes v. Wood, 98 Eng. Rep. 489 (K.B. 1763). But the duty of the trial judge to test a verdict for excessiveness and grant relief from one that oversteps the limits of reasonableness is equally plain. See Collins v. Brown, 268 F.Supp. 198, 201 (D.D.C. 1967) (Holtzoff, J.). Discharge of this responsibility has always been "regarded as not in derogation of the right of trial by jury but one of the historic safeguards of that right." Virginian Ry. Co. v.

Armentrout, 166 F.2d 400, 408 (4th Cir. 1948). The Court's function of review is particularly important in public actions like the present one. See Dellums v. Powell, supra, 184 U.S.App.D.C. at 319, 566 F.2d at 211 (Leventhal, J., concurring).

There was evidence in this case which supported findings that the defendants' conduct injured plaintiffs by denying them full association with other persons for pursuit of their social and political causes. The full extent of defendants' disruption of the associational privilege recognized by the First Amendment is especially difficult to assess, and so here, as in Tatum v. Morton and Dellums v. Powell, the compensatory award should "reasonably spacious." See Tatum v. Morton, supra, 183 U.S.App.D.C. at 334, 562 F.2d at 1282. The evidence did not and could not establish with certainty, for example, how many people were discouraged from participation in the semi-annual protests against the Viet Nam War in Washington when defendants diverted protesters to non-existent overnight lodgings, cancelled intercity bus transportation, and interfered with student marshalls' parade communications. Internal memoranda by FBI agents, however, boast of solid successes in deterring anti-war activities. There was, for example, evidence to prove that the attempt to exploit differences between the predominantly white elements (including plaintiffs) of the anti-war movement and black persons in the civil rights movement (including other plaintiffs) delayed collaboration between them and stirred racial distrust for a substantial period of time. There was solid evidence that the unrest thus generated by defendants wasted valuable time and energy and generated considerable anguish, and that plaintiffs were thereby diverted from pursuit of their protest activities.

But to define injury is not to measure it. The jury's quantification of the losses plaintiffs proved to them must be reviewed by the Court. The leading cases provide important

guidance. In Dellums, the jury returned verdicts of \$7,500 for each member of a class of persons unlawfully removed from the steps of the U.S. Capitol and detained by police during a public rally. The Court of Appeals held that the instructions had failed to provide sufficient guidance to the jury in measuring compensatory damages and reversed the judgments. The Court also concluded that the jury's award was "totally out of proportion to any harm that has been suffered." - See 184 U.S.App.D.C. at 304, 566 F.2d at 196. The Court of Appeals noted that the parties might seek, on remand, a determination by the trial judge of appropriate damages on the record at the first trial. 184 U.S.App.D.C. at 304 n.87, 566 F.2d at 196 n.87. On remand the trial judge, on the motion of the parties, fixed damages at \$750 for each class member based upon a supplemental trial record.^{41A/} In Tatum v. Morton, on the other hand, the trial court awarded plaintiffs, who had been unlawfully removed from an area near the White House, arrested, and subjected to unjustifiable rough treatment by police officers, only \$100 each. The Court of Appeals reversed the judgments because it considered \$100 inadequate to compensate each plaintiff for the loss of First-Amendment rights. On remand, the trier of fact awarded sums of roughly \$1,000 for each unlawful arrest, \$400 for each "strip search" of a plaintiff, and various other sums for injuries that resulted from the unlawful action of the police. There was no further appeal.

The present case is different from Dellums v. Powell or Tatum v. Morton in important ways: the injuries suffered here are for the most part quite unlike the traditional, hands-on common-law torts like assault and false imprisonment that helped guide the courts in Dellums and Tatum v. Morton. Here no blows were struck. There was no physical restraint. None of these plaintiffs were so completely deterred from the exercise of their First Amendment rights by defendants interference or harassment

^{41A/} See Dellums v. Powell, Civil Action No. 2271-71 (D.D.C., Dec. 13, 1979).

that the jury could have awarded sums that represented the total loss of the right to protest against the government; total loss of that right would, of course, have been "priceless," in any sense of the word. On the other hand, the jury was not required by the evidence to treat lightly the injuries suffered by plaintiffs simply because they were much smaller than they might have been. Cf. Tatum v. Morton, supra, 182 U.S.App.D.C. at 335, 562 F.2d at 1283.- The defendants' actions were sustained over a much longer period of time than was involved in the confrontation-like situations considered in the earlier cases. Not one, but many efforts at association and expression were affected. The jury could have observed, and reacted, to the evidence of the cumulative effect on each individual plaintiff of repeated, persistent, though subtle, harassment to impede political association and expression. The relatively limited nature of defendants' success in impeding plaintiffs' activities may have been considered by the jury to be more an indication of the special determination and discipline of the plaintiffs than of the skill, or absence of skill, of defendants in executing their plans.^{42/} Nevertheless, these awards would amount to far more than a year's compensation for the average person employed in the Washington area. Even making an allowance for the intangibility of the injuries the jury attempted to compensate and the high value our society places on freedom of expression, the awards border on the extravagant. Cf. Tatum v. Morton, supra. Each plaintiff may recover compensatory damages only for his or her own actual injuries. Carey v. Piphus, supra; cf. Dellums v. Powell, supra, 184 U.S.App.D.C. at 317-318, 566 F.2d at 209-10 (Leventhal, J., concurring).

^{42/} The Court is convinced that, in fixing the awards it did, the jury was not influenced by the kind of passion or prejudice that would require automatic invalidation of the verdicts. Cf. Butts v. Curtis Publishing Co., 351 F.2d 702, 717 (5th Cir. 1965), aff'd, 388 U.S. 130 (1967).

In appraising these verdicts under the restraints imposed upon a trial judge the Court has also considered, to paraphrase Dellums, whether the liability of each individual defendant may be "totally out of proportion to any harm" that the individual defendant caused. Cf. Dellums v. Powell, supra, 184 U.S.App.D.C. at 304, 566 F.2d at 196. If the standards extrapolated from the District Court and Court of Appeals decisions in Dellums and Tatum were applied to the liability of the individual defendants here, the large verdict against each defendant might well be disproportionate to the harm caused by that defendant. These liabilities range up to about \$75,000 in the case of defendant Brennan. The financial burden imposed by these verdicts upon government officials, and particularly retired ones, is heavy indeed. From their perspective it is difficult to say that the payments they are called on to make are commensurate with the harm the jury found that they caused personally. The actions which caused the injuries found by the jury occurred long ago and may be thought by some to be cured in substantial measure by time and by the very fact that the jury has heard the case and decided it for the plaintiffs against the defendants. Furthermore, plaintiffs suffered no financial loss against which defendants' financial burden can be compared. If in this case there were no restraints on the Court's prerogative and it could substitute its judgment for that of the jury, the Court would hold that the compensatory damage liability visited upon each defendant should be from ten (10) to twenty (20) percent of what the jury awarded. However, each defendant had some supervisory role, so that each shared responsibility for actions of other actors. More important, they were conspirators and shared responsibility for actions of a large number of co-conspirators. There is an inevitable inequity resulting from the fact that not all of the conspirators (possibly not even the principal conspirators) share proportionately in the financial

burden of compensating these plaintiffs for injuries caused in-part by co-conspirators. The law is such that a principal is responsible for his subordinate's actions in the circumstances here, and a co-conspirator is responsible for the actions of the conspiracy. This principle had to be applied in this case to make these defendants liable for injuries that other persons may have joined in causing without personal financial loss to themselves. See generally 1-P. Harper & P.-James, The Law of Torts-§ 10.1 (1956); W. Prosser, Handbook of the Law of Torts 297 (4th ed. 1971); see also id. at 313-23.^{43/}

In view of the foregoing the Court has considered very carefully whether these considerations require, or permit a new trial or proposal of a remittitur of a substantial percentage of the compensatory damages. The jury was given instructions that followed, as closely as possible, the guidelines established by the Court of Appeals for compensation of First-Amendment injuries. Only by finding that the jury simply valued too high these plaintiffs' First-Amendment rights could the Court disturb the verdicts. Such a finding can be made only if it appears from all the evidence at trial that "the verdict is so unreasonably high as to result in a miscarriage of justice," or . . . "so inordinately large as obviously to exceed the maximum limit of a reasonable range within which a jury may operate." Taylor v. Washington Terminal Co., 133 U.S.App.D.C. 110, 113-14, 409 F.2d 145, 148-49 (1969) (quoting Frank v. Atlantic Greyhound Corp., 172 F.Supp. 190, 191 (D.D.C. 1969) and Graling v. Reilly, 214 F.Supp. 234, 235 (D.D.C. 1963)). Though the question is a close one, in light of the burden on defendants, the Court cannot say that the compensatory awards to the eight prevailing plaintiffs can, under the Taylor standard, be set aside for excessiveness. Similarly the Court cannot say that the distinction in the verdicts between the five plaintiffs recovering one sum and the three recovering another sum impeaches the jury's work. Nor can

^{43/} Nothing decided here precludes any claim over for contribution against other co-conspirators or aiders or abettors or their estates.

the Court accept the District of Columbia's argument that the damages against itself were so extraordinary as to be excessive, even if the other awards were not.^{44/} So the Court concludes, with considerable reluctance, that whatever it might have ruled as a trier of fact, it is bound to leave undisturbed the jurors' decision on the measure of compensatory damages awarded in this constitutional tort and conspiracy case.^{45/}

B. Punitive Damages

Punitive damages, assessed over and above the amount needed to compensate the injured party, are intended to punish the wrongdoer and to deter him and others from similar misconduct in the future. See City of Newport v. Fact Concerts, Inc., supra, 101 S.Ct. at 2759 (1981). In this case the jury awarded substantial sums in punitive damages against the five FBI defendants, former Chief Wilson, and former Inspector Herlihy. Each of those defendants now challenges the punitive awards.^{46/}

The standard for award of punitive damages is simple: "[t]he tort must be aggravated by evil motive, actual malice, delib-

^{44/} The District may well have been held liable for injuries inflicted on plaintiffs by persons other than the individual MPD defendants named in this action. Such a result would not have been implausible under the Monell rule, or unreasonable given the evidence in this case. The Court has considered, and rejected, the possibility that the jury erroneously awarded punitive damages against the District under the guise of compensatory damages.

^{45/} There is simply no basis for assuming, as the FBI defendants have, that the verdicts are erroneous because they resulted in awards of the same amounts against defendants Jones and Pangburn. Whether the two were responsible for the same quantum of plaintiffs' injuries is a question proper for the trier of fact, and the jury's result was scarcely so self-evidently irrational as to permit the Court to set the verdicts aside.

^{46/} The parties did not brief the City of Newport case, and it was not until after the case had been submitted to the jury that the Court discovered the case. Consequently the Court erred in giving instructions that would have permitted a punitive award against the District of Columbia. See 101 S.Ct. at 2762. The error was harmless, however, because the jury made no punitive award against the District government.

erate violence or oppression.'" Nader v. Allegheny Airlines, 167 U.S.App.D.C. 350, 372, 512 F.2d 527, 549 (1975), rev'd on other grounds, 426 U.S. 290 (1976) (quoting Black v. Sheraton Corp. of America, 47 F.R.D. 263, 271 (D.D.C. 1969)). The evidence supported a finding by the jury that the FBI defendants---each of whom asserted a "good faith" immunity defense which the jury rejected---deliberately sought to oppress plaintiffs in the exercise of their First-Amendment rights. There was evidence that the FBI defendants acted with zeal, initiative, and resourcefulness in a campaign of deliberate disruption of lawful protest over a long period. They attempted and effected unlawful restraints on political association for the purpose of political expression. Their conduct violated clear commands of the Constitution as it has been repeatedly and authoritatively interpreted and enforced by the Supreme Court.^{45A/} "It is fundamental that the trier of fact may find malice by drawing inferences from the defendant's conduct. These deductions are findings of fact and are subject to the clearly erroneous standard." Nader v. Allegheny Airlines, supra, 167 U.S.App.D.C. at 374, 512 F.2d at 551. With respect to the FBI defendants, the Court is convinced that there was ample evidence for an award of punitive damages.

The question then becomes, with respect to the five FBI defendants, whether the awards were excessive. See Afro-American Publishing Co. v. Jaffe, 125 U.S.App.D.C. 70, 83, 366 F.2d 646, 662 (1969) (en banc); Central Armature Works v. American Motorists Ins. Co., 520 F.Supp. 283, 296 (D.D.C. 1980). In a case of this type, in which plaintiffs have an independent statutory basis for recovery of attorneys' fees, punitive damages obviously have no role in compensating them for the costs of litigation. Cf. Central Armature Works v. American Motorists Ins. Co., supra. Nor is there a "profit" wrongfully obtained by the defendants in this case that should be disgorged through the

^{46A/} See, e.g., Healy v. James, 408 U.S. 169, 181 (1972); NAACP v. Button, 371 U.S. 415, 430 (1963).

punitive award. Id.^{47/} The sole functions of the punitive damages the jury awarded in this case were to punish and to deter. The Court cannot say that the awards the jury made, substantial as they were, were "larger than should be condoned in simple justice." Afro-American Publishing Co. v. Jaffe, supra, 125 U.S.App.D.C. at 84, 366 F.2d at 663. Confronted with the evidence in this case, the jury could well have decided, in the exercise of calm and dispassionate reason, that the sums it fixed as punitive damages against the FBI defendants were required as a sanction for those defendants' conduct and to ensure that such conduct would not be repeated in the future.

The punitive awards against the two MPD defendants, however, stand on different footing. The jury has broad discretion in determining whether to award punitive damages, and in assessing the amount of punitive damages. See City of Newport v. Fact Concerts, Inc., supra, 101 S.Ct. at 2761. But despite the convincing proof of their participation in conspiracies among themselves and with the FBI defendants, the evidence will not support the punitive awards against the former MPD officers. Although there was evidence that the MPD defendants acted with a bad intent, there is no basis, in the evidence against them, for believing that a punitive award is required to deter similar conduct by MPD officers in the future. COINTELPRO was an FBI activity. The FBI defendants were among its instigators and its leaders. There is no evidence that the key FBI directives, with their call for initiatives to disrupt plaintiffs' associations, embraced the MPD defendants.^{48/} Deterrence of the FBI defendants could reasonably be expected to effect deterrence of all defendants and those who participated with them without

^{47/} The fact that others responsible for damages caused by the conspiracy did not pay their share, cannot be weighed here.

^{48/} See Plaintiffs' Exhibits 1-3.

imposition of separate punitive damages on MPD defendants. Though willing participants in the program to disrupt plaintiffs' activities, the MPD defendants followed the lead of the federal officers in many instances, and appear sometimes simply to have relied unreasonably on their own assumptions about the requirements of public order. However unreasonable a defendant's conduct may have been under the circumstances that confronted him, gross negligence will not justify a punitive award. Chesapeake & Potomac Telephone Co. v. Clay, 90 U.S.App.D.C. 206, 194 F.2d 888 (1952); see also Nader v. Allegheny Airlines, supra. And some evidence of bad intent---enough in this case amply to support the conspiracy verdicts---cannot alone support a punitive judgment unless such an award seems required to deter future misconduct. Whether it is called compensatory or punitive, the whole award granted to a plaintiff and against a defendant in a public action like the present one has a deterrent function. See Owen v. City of Independence, supra, 101 S.Ct. at 1416. Considering the evidence in a light most favorable to plaintiffs' claim for punitive damages, but also bearing in mind the jury's sizeable compensatory awards, the Court has concluded that the punitive judgment against defendants Wilson and Herlihy was not supported by the evidence. Wilson and Herlihy accordingly will have judgment n.o.v. on the punitive damages issue. Cf. Afro-American Publishing Co. v. Jaffe, supra.

IX. Conclusion

An accompanying Order will grant the motions of defendants Wilson and Herlihy for judgments notwithstanding the verdicts assessing punitive damages against them, and deny all other motions. Plaintiffs' prayer for injunctive relief remains under advisement.

Date: May 31, 1982

Louis F. Oberdorfer

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS HOBSON, et al.,
Plaintiff,
v.
JERRY V. WILSON, et al.,
Defendants.

Civil Action No. 76-1326

FILED

JUN - 1 1982

ORDER

JAMES E. DAVEY, Clerk

For the reasons stated in the accompanying Memorandum,
it is this 31st day of May 1982 hereby.

ORDERED: that the motion of the federal defendants for
judgment notwithstanding the verdict or for a new trial be
denied; and it is further

ORDERED: that the motion of the District of Columbia
defendants for judgment notwithstanding the verdict assessing
punitive damages against defendants Wilson and Herlihy be
granted; and it is further

ORDERED: that the motion of the District of Columbia
defendants for judgment notwithstanding the verdict or for
a new trial, insofar as it seeks relief other than judgment
notwithstanding the verdict assessing punitive damages,
be denied.

Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS HOBSON, et al.,

Plaintiffs,

v.

JERRY V. WILSON, et al.,

Defendants.

Civil Action No. 76-1326

FILED

JUN - 1 1982

JAMES E. DAVEY, Clerk

ORDER

The Court is in receipt of plaintiffs' letter of May 12, 1982, regarding their prayer for equitable relief in this action. To permit final disposition of plaintiffs' claims, it is this 31st day of May 1982 hereby

ORDERED: that the parties may file, on or before June 15, 1982, brief memoranda addressing these issues:

1. Whether plaintiffs' claim for an injunction prohibiting reinstatement of certain discontinued FBI and MPD activities that were the subject-matter of their damages claim is moot, or cannot be granted because the remedy at law has been adequate; and

2. Whether plaintiffs' claim for release of their FBI files to them and destruction of all copies to them should be granted; and it is further

ORDERED: that counsel for the federal defendants also indicate in any memorandum they may file whether the Bureau has any files regarding plaintiffs that were not the subject of prior Freedom of Information Act requests, and include in the memorandum a brief description of the Bureau's disposition of plaintiffs' past FOIA requests; and it is further

ORDERED: that the parties may file reply memoranda to the aforementioned memoranda on or before June 22, 1982.

Louis T. Oberdorfer
UNITED STATES DISTRICT JUDGE

6/15/82

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

JULIUS HOBSON, et al.,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action
)	76-1326
JERRY WILSON, et al.,)	
)	
Defendants.)	

MEMORANDUM BY DEFENDANT WILLIAM H. WEBSTER
IN RESPONSE TO COURT'S ORDER OF MAY 31, 1982,
REGARDING PRAYER FOR EQUITABLE RELIEF

A. Having received a letter from plaintiffs' counsel regarding the issue of equitable relief, this Court has requested that the parties file brief memoranda on the following issues:

1. Whether plaintiffs' claim for an injunction prohibiting reinstatement of certain discontinued FBI and MPD activities that were the subject matter of their damages claim is moot, or cannot be granted because the remedy at law has been adequate; and
2. Whether plaintiffs' claim for release of their FBI files to them and destruction of all copies to them (sic) should be granted.

As to the first issue, defendant Webster, who is sued in his official capacity as Director of the Federal Bureau of Investigation, makes the following comments:

1. Neither in the original nor in any amended complaint have plaintiffs made any claim for an injunction prohibiting or restraining activities or programs of the Federal Bureau of Investigation.

2. Neither at trial nor in connection with any other proceeding or motion in the course of this civil action have plaintiffs offered evidence to establish (a) any continuing activity by the Federal Bureau of Investigation of the type complained of, (b) any threat of reinstatement by the Federal Bureau of Investigation of the counterintelligence program, or (c) any present or objective future harm to themselves caused by activity of the Federal Bureau of Investigation. By the same token, defendant Webster has had no opportunity to offer contrary evidence.

3. A fundamental element necessary to the award of injunctive relief was capsulized by the Supreme Court in State of Connecticut v. Commonwealth of Massachusetts, 282 U.S. 660 (1931):

Injunction issues to prevent existing or presently threatened injuries. One will not be granted against something merely feared or liable to occur at some indefinite time in the future.

282 U.S. at 674.

This precept has present viability in the courts of the United States, see Wright & Miller, Federal Practice and Procedure: Civil §2942, including the District of Columbia Circuit, see, e.g., Reporters Committee for Freedom of the Press v. American Telephone & Telegraph, 593 F.2d 1030, 1065 (D.C. Cir. 1978), cert. den., 440 U.S. 949 (1979); Exxon Corp. v. F.T.C., 589 F.2d 582, 594 (D.C. Cir. 1978), cert. den., 441 U.S. 943 (1979); Long v. District of Columbia, 469 F.2d 927, 932 (D.C. Cir. 1972); Doe v. McMillan, 459 F.2d 1304 (D.C. Cir. 1972); and also Don't Tear It Down, Inc. v. GSA, 401 F. Supp. 1194 (D.D.C. 1975). Consequently, injunctive relief is not appropriate.

The second issue is whether plaintiffs' files should be turned over to them for destruction. Defendant Webster notes with respect to this issue that during discovery in this civil action plaintiffs received their entire files except for material declared privileged and not disclosed. Formal claims of privilege were submitted to this Court, relating principally to state secrets and the identities of informants, and in each instance the Court sustained the claim of privilege. Turning over the files to plaintiffs would nullify the privilege claims and is therefore inappropriate.

In addition, destruction or expunction of the files of plaintiffs is precluded by prior Orders of this Court, United States District Judge Harold H. Greene, in American Friends Service Committee, et al. v. William H. Webster, et al., Civil

Action 79-1655, entered January 10, 1980, and July 1, 1981 (Appeal pending). [See Exhibit A.]. The Orders restrain the Federal Bureau of Investigation from destroying or otherwise disposing of or approving the destruction or disposition of any Federal Bureau of Investigation files. This injunction will remain in effect until such time as the Court approves a detailed record retention and destruction plan. Although certain exemptions and exceptions to the bar against destruction have been included in the injunction, they are not pertinent to the circumstances of this case. In particular, Judge Greene's Order contains no categorical exception permitting file destruction ordered by another court of competent jurisdiction.*/

B. In addition to discussion of the claims for injunctive relief, this Court requested the federal defendants to supply certain information regarding plaintiffs' requests for files made pursuant to the Freedom of Information Act, 5 U.S.C. § 552**/. The following information based on review of FBI records is provided.

Plaintiff Sammie Abbott requested FBI Headquarters files relating to himself and to the Emergency Committee on the Transportation Crisis on December 17, 1975. In 1977, he was given access to the files requested.

Plaintiff Abraham Bloom apparently has not requested his own files. On July 5, 1975, he requested FBI Headquarters files on the Washington Area Peace Action Coalition and the Washington Mobilization Committee. In 1976 and 1977 papers from these files were released to him.

/ Even in the absence of the injunction, the relief of file expunction is not automatically granted. See, e.g. Paton v. LaPrade, 524 F.2d 862 (3rd Cir. 1975).

**/ The purpose of this request is unclear inasmuch as plaintiffs have made no claims under the Freedom of Information Act. In any event, during discovery plaintiffs requested and received, except for privilege matters, the files pertaining to them in FBI Headquarters and the Washington, D.C., field.

Plaintiff Richard Pollock requested his FBI Headquarters file on August 14, 1975. Documents were released to him in 1975 through 1978.

Plaintiff Arthur Waskow requested files from FBI Headquarters and the Washington Field Office on April 3, 1975. Papers were released in 1975, and in 1977 he was notified that additional papers were available.

On February 9, 1976, William E. Munger requested the FBI Headquarters files pertaining to the Washington Peace Center. Papers were released in 1977.

On July 16, 1976, plaintiff Tina Hobson requested any files pertaining to her in FBI Headquarters. She was advised that Headquarters had no main files pertaining to her. Subsequently, the Civil Service Commission informed the FBI that it had received a request from Ms. Hobson and that it had documents which had originated with the FBI's Washington Field Office. In 1977 the documents referred from the Civil Service Commission were released.

Plaintiffs Reginald Booker and David Eaton apparently have not requested files or records from the Federal Bureau of Investigation.

CONCLUSION

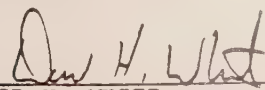
For the foregoing reasons, plaintiffs' request by letter for injunctive relief should be denied.

Respectfully, submitted

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STANLEY S. HARRIS
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Webster.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

American Friends Service
Committee, et al.,

Plaintiffs,

v.

William H. Webster, et al.,

Defendants.

Civil Action No. 79-1655

FILED

JAN 10 1980

JAMES E. DAVEY, Clerk

ORDER

In accordance with the findings of fact and conclusions of law contained in the Opinion published contemporaneously herewith, it is this 10th day of January, 1980,

ORDERED That a preliminary injunction be and it is hereby issued restraining defendants from destroying or otherwise disposing of or approving the destruction or disposition of any Federal Bureau of Investigation files until such time as the defendants have developed and submitted to this Court detailed records retention plans and schedules, encompassing both headquarters and field office files, based on inspection of FBI files by trained archivists and historians and formulated in accordance with the standards outlined in the Opinion, and it is further

ORDERED That this injunction shall remain in effect until such time as this Court approves the submissions made by the defendants pursuant to this Order or until further order of the Court.

Harold H. Greene
United States District Judge

January 10, 1980

510

ATTACHMENT A

145-12-4141
FP

UNITED STATES DISTRICT COURT

AMERICAN FRIENDS SERVICE
COMMITTEE, et al.,

Plaintiffs,

v.

WILLIAM H. WEBSTER, et al.,

Defendants.

Civil Action No. 79-1655

FILED

JUN - 9 1981

MEMORANDUM

JOSE E. DAVIS, Clerk

On January 10, 1980, the Court issued an order which prohibited the destruction of further records of the Federal Bureau of Investigation pending formulation and approval by the Court of a record retention plan in accordance with law. The opinion which accompanied the Court's injunction (485 F.Supp. 222) recited in detail a thirty-year record of failure by the National Archives and Records Service (Archives)^{1/} and the Federal Bureau of Investigation to comply with the various statutes which require scrutiny and approval by the Archives as a prerequisite to the destruction of government documents. See 44 U.S.C. §§ 2101, 3101, 3301 et seq.

These record retention laws are intended, inter alia, to insure the preservation of those documents which have historical value, which are necessary to protect the legal rights of individuals affected by an agency's operations, which memorialize the policies and decisions of an agency, or which otherwise have administrative, legal, or research value warranting their further preservation. The theory underlying these laws is that the basic decisions concerning the destruction and preservation of government documents shall be made by the impartial professionals of

^{1/} The agency is also referred to as NARS. The archival responsibilities were at various times under the jurisdiction of either the Archivist of the United States or the General Services Administration.

Archives rather than by the officials of the agencies and thus generating or accumulating the records who may have contrary interests and goals (e.g., an interest in burying their mistakes or misdeeds).

The evidence adduced during the hearing of this case in December, 1979 revealed that, notwithstanding the requirements of the law, the FBI had never submitted (except in the most perfunctory manner) to these requirements and that the Archives had never attempted to carry out its statutory responsibilities with respect to that agency.^{2/} The Court noted that the Congress had implicitly recognized the right of the public to know about the activities of its government by providing access (barring security and privacy considerations) to the government's records for intimate research and similar purposes. It noted further that this congressional mandate had special relevance to the FBI inasmuch as "its files, perhaps more than those of any other agency, constitute a significant repository of the record of the recent history of this nation, and they represent the work product of an organization that has touched the lives of countless Americans including those in public life, those who have achieved notoriety and those who have been subjected to background or security investigations]." 485 F. Supp. at 235. In view of the failure of the FBI and the Archives to comply with the law over a very long period of time, the Court, as indicated, enjoined the further destruction of FBI records pending the adoption and implementation of a lawful record retention plan.

As the Court said at the time, the explanation for the dereliction of duties by the archival authorities appeared to be that the FBI, in accordance with the policies established by its then Director J. Edgar Hoover, was not in the habit of granting to anyone outside the FBI access to its files; that the employees of the Archives were aware of this policy; and that in view of what was regarded as the futility of making access demands they did not even attempt to conduct personal inspections of the FBI's records." 485 F. Supp. at 229.

I

Shortly after issuance of the injunction, the government requested, and was in the main granted, exemptions from the ban on destruction for certain classes of records.^{3/} Subsequently, on April 15, 1980, the government also sought, but unsuccessfully, the dissolution of the Court's original order on the basis of an intervening Supreme Court decision.^{4/} At various times during this period, the government indicated to the Court that it was contemplating appellate review, but no appeal was ever pursued.^{5/}

In its January, 1980 opinion, the Court stated that a record retention plan for the FBI and implementing schedules were to be "submitted to the Court for its approval within ninety days hereof." 485 F. Supp. at 236.^{6/} Nevertheless, for well over one year, neither the Archives nor the FBI took any action to carry out the Court's order and the mandates of the law.^{7/} Ultimately, plaintiffs advised the Court of the failure of the government to comply, and a hearing was held on February 26, 1981, to determine what further Court orders were appropriate. That hearing, at which testimony was taken, confirmed that no significant action had been taken to carry out the Court's mandate; that the government had no legitimate excuse for its failure to act; and that,

^{3/} Excluded from the scope of the preliminary injunction were National Crime Information Center entries; certain fingerprint cards (see Memorandum and Order of February 20, 1980); specified General Records Schedule categories; pending Privacy Act expungement material; and specified arrest data (see Order of April 3, 1980).

^{4/} Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136 (1980).

^{5/} The government did file a notice of appeal from the Court's Orders of April 3, and April 22, 1980, to the extent that they in part denied its motions for modification of the preliminary injunction. However, subsequently the government voluntarily dismissed the appeal.

^{6/} The injunction itself did not explicitly include this time limit.

^{7/} Witnesses at the hearing referred to development of a "preliminary plan" and to various implementation meetings and discussions, but nothing tangible was accomplished, apparently because the FBI insisted on its right to modify the Court's order sua sponte to exclude certain records, and the Archives was, in effect, paralyzed by the FBI's position.

except for vague and indefinite plans, no implementing action was being undertaken.^{8/} Thus, the Court is faced with the issue of how to proceed next to insure compliance with the laws enacted by the Congress and with its own orders.

II

The Court has considered proceeding by way of contempt, but it has concluded that such a course of action is not appropriate. Just as the Archives and the FBI at the original hearing of this action in October, 1979 tended to shift responsibility to each other for their failure to carry out their statutory duties during the preceding thirty-year period, so they have continued to blame each other for their lack of compliance since then. For that reason, it is difficult to pinpoint any particular official in either agency as being in contempt of court.^{9/} More importantly, although, as indicated, the Court's opinion provided for a ninety-day period within which the defendants were to take action, the order itself contained no such specific deadline. See note 6 supra. Given the procedural requirements of the contempt laws designed for the protection of defendants, it is not likely, therefore, that any particular individual could be found to be in criminal contempt of court.

Although there was thus technically no criminal contempt, defendants did display a disdain for the law and court orders^{10/} that, one would have imagined, may have been more typical of an

^{8/} Indeed, essentially all the government was prepared to do at that time was to submit new and additional requests for exemptions. See Part IV infra, and note 16 infra.

^{9/} At the February 26, 1981, hearing, various witnesses from both the FBI and the Archives conveniently placed the bulk of the blame on a former Department of Justice attorney who has left government employment and moved to Cincinnati.

^{10/} It is noteworthy that none of those orders in any way affected vital FBI functions: there are no requirements of disclosure of sensitive information to outsiders; there is no inhibition on law enforcement techniques; there is no effort to restrain the FBI either in its security or in its criminal investigation functions. Still, there has been no compliance.

earlier era.^{11/} The Court did not include a specific, binding deadline in the January 1980 Order itself -- and it did not, at the outset of this litigation, grant plaintiffs' requests for more drastic relief, such as the appointment of a trustee to supervise the FBI's files pending the development of a lawful record retention plan -- because it believed that the defendants would comply with the orders of the Court in good faith. The history of the last year and a half demonstrates that this belief was ill-founded.

At the request of the Court, plaintiffs have submitted a proposed order designed to insure future compliance with the prior orders of this Court. The Court has considered that proposal, as well as memoranda submitted by both parties and, based on these submissions, it is this date issuing an order which in more detailed form than the January 1980 injunction is designed to insure compliance with the archival laws.

Defendants' objections to those matters with respect to which the Court is below sustaining plaintiffs' requests^{12/} rest

^{11/} In view of the history of this case, which indicates that the FBI has consistently been able to secure different treatment from the Archives than have other governmental agencies, the FBI must be regarded as basically responsible for the present impasse.

^{12/} A number of plaintiffs' demands are being denied, including their request that copies of all document to be provided to Archives also be furnished at the same time to the Court and to plaintiffs; that the FBI file an inventory of all of its records (including those at headquarters, at field offices, and liaison offices); that the Archives submit the retention schedules to the Comptroller General for review; that special provision be made for certain sensitive information; and that outside consultants be required to be drawn from specified organizations. All of these requests are not necessary at this time..

On the subject of attorney's fees for plaintiffs, it appears, as stated above, that no individual could technically be found in criminal contempt. Accordingly, no award of fees, costs, or compensatory fines grounded in the concept of contempt would be appropriate. Nevertheless, since defendants have acted in bad faith in failing to comply with the clearly stated requirement of the January, 1980 opinion, and since it is apparent that this conduct has imposed substantial litigation costs upon plaintiffs over the past year, the Court will reserve to plaintiffs the opportunity to demonstrate that, both legally and factually, they are entitled to attorney's fees on these bases. The Order accompanying this Memorandum includes a briefing schedule for the articulation of the parties' claims on this issue.

in the main on the premise that Archives and the FBI have discretion on how to proceed and that there is no warrant for the imposition by the Court of detailed procedures. As indicated, in January 1980, the Court relied on the exercise of discretion in good faith by the agencies, but it was met with an overwhelming lack of success. In these circumstances, the generalities cited in defendants' memoranda are not persuasive. Short of contempt procedures, which for the reasons suggested above are not presently appropriate, the Court has no alternative but to prescribe in more detail how the Archives and the FBI shall carry out their responsibilities under the law and the court order. Such a course is not only lawful and appropriate but necessary if the Court is not to abdicate its responsibilities.

III

Today's Order requires the Archives and the FBI each to designate an employee at the level of an assistant director or assistant archivist (Liaison Official), who will be responsible for insuring compliance with the Court's orders in this case, for the submission of the periodic reports to the Court, and for advising the head of the agency of any difficulties, problems, or recalcitrance in implementation.^{13/} The Order further requires the FBI to afford full and complete access to designated employees of the Archives to the files and records of the FBI covered by the January 1980 order of this Court (as amended by subsequent orders). To the extent that Archives employees are unable to perform the responsibilities required by the Order, either substantively or within the time limits provided, the agency will

^{13/} This procedure will not relieve any other official or employee of the Archives or of the FBI of responsibility for failure to carry out the orders of the Court. It is simply designed to centralize responsibility and thus to avoid a recurrence of the situation described above where no one was prepared to assume responsibility.

have to employ independent consultants to carry out these responsibilities expeditiously.^{14/}

Beyond that, in order to permit the Archives to begin to carry out its work, the FBI shall, without further delay, provide to the Archives (a) its manuals and directives relating to the creation, maintenance, disposal of records, and to the organization, function, policies, procedures, and operations of the agency; (b) a list of the types of records which in the judgment of the FBI need to be preserved under the law and the standards and guidelines used by the FBI in arriving at such judgments; and (c) a description of the investigation classifications used by the FBI and the number of files in each such classification. The Liaison Officials are required to file affidavits with the Court certifying that these requirements have been fully implemented (or, if they have not, the extent to which they have not and detailed reasons therefor).

Insofar as the Archives is concerned, the order provides that it shall forthwith (a) designate, and file with the Court, a list of the names and the qualifications of the archivists, historians, and other professionals who will undertake the responsibilities required under the Court's January, 1980 order; (b) establish and file with the Court the standards it will use in its examination of the FBI's files in accordance with law and the Orders of the Court; (c) review the "00" sections of each of the FBI's 214 classifications of investigative files and other records to determine which shall be preserved in toto, which may be preserved more selectively, and which may be disposed of, and it shall file with the Court such information and the basis for its conclusions; and (d) submit to the Court its detailed explanation

^{14/} As the Court has previously indicated, these employees and consultants may be required to undergo a security clearance. However, inasmuch as the defendants have neglected to perform their responsibilities for more than a year since the Court's order, no further delay due to the unavailability of cleared personnel will be permitted. To the extent that this requirement causes exceptional and insuperable problems, the Liaison Officials shall forthwith bring them to the attention of the Court for appropriate action.

the methodology used to provide for its plan to examine a relatively large number of files which are unlikely to have permanent or research value while largely exempting from such examination records which probably do have such value.^{15/}

The Archives is also being ordered to submit a recommended action plan to the FBI by September 28, 1981, the FBI is required to submit a records disposition schedule based on that plan by October 16, 1981, and both agencies shall file with the court detailed retention plans and disposition schedules by September 9, 1981. Twenty-two months after the hearing in this case is an adequate amount of time for achieving compliance with the law.

IV

On February 24, 1981, and on March 23, 1981, the government filed motions for modification or clarification of the Court's previous order.

It may be observed initially that, had the Archives and the FBI carried out their responsibilities in a diligent manner as contemplated in January, 1980, there would have been no occasion for requests for modification or clarification in the spring of the following year.^{16/} It may also be observed that if the order entered last January had been styled technically a permanent injunction rather than a preliminary injunction, the present requests might

For example, large numbers of files are apparently intended to be examined under the Migratory Bird Act rubric, but relatively few dealing with espionage or subversion are to be inspected. See Plaintiffs' Comments on NARS' Scientific Methodology, 4-5.

Several modifications were applied for and granted shortly after the entry of the injunction. See note 3 *supra*. Thus, the defendants were fully aware of the procedure for seeking exemptions. Their failure to ask for all desired modifications and clarifications at that time is inexplicable (except on the basis of their interest in the implementation of the Court's orders which lapsed and was revived only when their failure to comply was brought to the Court's attention).

have been out of time 17/ In any event, the Court has considered the various requests of the government on their substantive merits.

The government's February 24 motion requested the Court to modify its Order to exclude from its scope tax returns and tax return information, grand jury material, and various so-called Title III wiretap documents, on the grounds that archival review of these materials is prohibited by the operation of other statutes. The March 23, 1981, motion requested an exclusion from the scope of the order of three additional types of materials: the objects of Privacy Act expungement requests; informants' names; and seized or voluntarily contributed personal property. These will be considered seriatim.

1. Section 1202 (a)(1) of the Tax Reform Act of 1976, 26 U.S.C. § 6103, prohibits, with enumerated exceptions, the disclosure of tax returns and tax return information material by government employees. The government argues that this prohibition precludes the FBI from granting the Archives access to tax return material for purposes of archival review. This position is not well taken. Subsection (n) of section 6103, U.S. Code provides that "returns and return information may be disclosed to any person . . . to the extent necessary in connection with the processing, storage, transmission, and reproduction of such returns and return information" On its face, the use of the word "storage" appears to encompass the very sort of access envisioned by the archival statutes.

In any event, even if that exception was for some reason not designed to cover this specific situation, a reasonable reading of the archival statutes and the tax return statutes in concert indicates that Congress did not intend to foreclose the Archives from reviewing tax return information in the performance of its archival duties. Section 2906 of Title 44 was amended by the

17/ The Court orders today that the parties show cause on or before June 19, 1981, why the January 10, 1980 preliminary injunction, as amended previously and herein, shall not be made a permanent injunction.

Federal Records Management Amendments of 1976 seventeen days
of the Tax Reform Act of 1976 to read, in relevant
part, as follows:

[T]he Administrator of General Services or his designee may inspect the records . . . of any Federal agency. . . . Officers and employees of such agencies shall cooperate fully in such inspections Records, the use of which is restricted by law . . . shall be inspected, in accordance with regulations promulgated by the Administrator, subject to the approval of the head of the agency concerned or of the President. . . . In conducting the inspection of agency records . . . the Administrator or his designee shall . . . comply with all other Federal laws and be subject to the sanctions provided therein.

The Senate Government Operations Committee explained the purpose of the modification of section 2906 (S. Rep. No. 94-1326, 94th Cong., 2d Sess., at 6):

The Committee desired to reiterate its position that the GSA Administrator or his designee would have the authority to inspect records in order to make recommendations for improving records management practices and programs. At the same time, the Committee intended to make clear that protections contained in the Privacy Act of 1974 regarding the disclosure of personal information apply to such activities of GSA. Due to the large and broad mandate given to the GSA to inspect the records of other Federal agencies and the requirement that such agencies give the GSA full cooperation in such inspections, it was felt that strong protection be provided for the protection of the personal information maintained about citizens which might be kept in certain government files.

In light of the indication that the Congress considered the tension between archival and privacy statutes almost contemporaneously with the enactment of the provision of the tax statute relied upon by the government, added specific provisions for the protection of information within the review of the Archives, and explicitly reiterated the comprehensive scope of the Archives' mandate, the Court concludes that the review of tax returns and tax return information by the Archives pursuant to its statutory

duties does not constitute "disclosure" under 26 U.S.C. § 6103

....., but required.^{18/}

2. Insofar as grand jury and Title III materials^{19/} are concerned, the issue is closer. It does not appear that there is precedent squarely on point on the question of whether review by the Archives would constitute "disclosure" as that term is used in Rule 6(e) of the Federal Rules of Criminal Procedure and in 18 U.S.C. § 2517. But see, United States v. Interstate Dress Carriers, Inc., 280 F.2d 52, 54 (2nd Cir. 1960). Before rendering a decision on this aspect of defendants' motion, it is appropriate that the Court be apprised of practical precedent with respect to these materials. Accordingly, the Archives shall, within ten days hereof, file affidavits specifying the extent to which it may now be in possession of or have had the opportunity to review grand jury or Title III material as a consequence of receiving it from government agencies other than the FBI. The affidavit shall specify in precise detail the agency or agencies involved, the age of the material, any special restrictions that may have been imposed, and any other facts which may be pertinent to the issues presently under consideration. Within the same time period, the FBI shall file affidavits specifying the means by which it came to possess grand jury data and materials under court seal, the degree to which these materials are legally court or FBI documents, the volume of such materials, and the extent to which they are or may be segregated from other FBI files. No records in any of these categories shall be disposed of without further order of this Court.

3. On April 3, 1980, the Court granted the government's motion that its January 10, 1980 order be modified to exclude certain then-pending Privacy Act expungement requests. The government now seeks clarification of that order to confirm that

^{18/} It may be noted that unrebutted testimony at the February 26, 1981, hearing implied that the Archives routinely enjoys access to tax returns from IRS files.

^{19/} Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510 et seq.

the January 10 order "does not apply to any Privacy Act requests for expungement of entire files which are not subject to moratoria by other courts where NARS has reviewed the file in question and approved its destruction." The Court did not intend to restrict its April 3 order to those requests that were pending on that date. Accordingly, this portion of the government's motion will be granted.

4. The government offers to the Court for its approval a "procedure [Archives] and the FBI have developed to handle the sensitive issue of protecting informants' names" -- a procedure which, in essence, denies such information to Archives. In its brief, the government makes no reference to statutory authority in support of such denial but relies solely on the agreement between the two agencies.

The conduct of both the FBI and the Archives is governed by law. Title 44 of the United States Code requires the review of records by the Archives, and no other statute provides an exception for informant data. The statutes of the United States may not be vitiated or suspended by agreement negotiated between various executive agencies, and for that reason the government's request is patently without legal support.

Two additional observations are appropriate. First, the agreement between the two agencies constitutes yet another episode in a thirty-year history of failure of the Archives to perform its obligations with regard to the records of the Federal Bureau of Investigation. See p. 2 supra. The Archives must, somehow, begin to understand that its obligations under law supersede its relationships with the FBI. Second, defendants have sought to justify the FBI-Archives agreement on the basis

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN FRIENDS SERVICE
COMMITTEE, et al.,

Plaintiffs,

v.

LIAM H. WEBSTER, et al.,

Defendants.

Civil Action No. 79-1655

FILED

JUN - 9 1981

ORDER

EVERETT DAVEY, JR.

Upon consideration of the matters raised at a status call on January 13, 1981 and the reports filed with this Court, and the Court having issued an order dated February 20, 1981 directing Defendants Federal Bureau of Investigation (FBI) and National Archives and Records Service (Archives) to present evidence and authority as to what action the aforesaid defendants have taken and have failed to take to comply with the Court's order dated January 10, 1980, and the matter having come on for a hearing on January 26, 1981, and upon the evidence then presented and the entire record herein, it is this 9th day of June, 1981, in accordance with a Memorandum issued this date hereby ORDERED:

1. Liaison officials to be designated:

(a) the Director of the FBI shall designate forthwith and file with the Court the name of an employee at the level of an assistant director who shall be responsible for the full and faithful compliance by the FBI with this Court's order of January 10, 1980, and its subsequent orders; who shall report to the Court as required herein with respect thereto; and who shall advise the Director of the FBI of any difficulties, problems, or recalcitrance with respect thereto; and

(b) the Archivist of the United States shall designate forthwith and file with the Court the name of an employee at the level of an assistant archivist who shall be responsible

for the full and faithful compliance by Archives with this Court's order of January 10, 1980. . . .
ders; who shall report to the Court as required herein with respect thereto; and who shall advise the Archivist of any difficulties, problems, or recalcitrance respect thereto.

2. Not later than July 6, 1981, the FBI shall

(a) grant to Archives, its designated employees, and such independent consultants as Archives may designate, full and complete access to all of the files and records of the FBI covered by the order of this Court of January 10, 1980, as modified by subsequent orders of this Court;

(b) make available to Archives all manuals, procedural and operational directives, and standards, guidelines, regulations, orders (current as well as obsolete) relating to the organization, policies, procedures, and operations of the FBI and relating to the creation, maintenance, and disposal of its records;

(c) provide to Archives a list of all types of its records which in the opinion of the FBI it must preserve to a full and accurate history of its corporate existence, its functions, policies, decisions, procedures, and other activities because of their historical, administrative, legal, research and other value, and those records necessary to protect the financial and legal rights of persons and the government affected by the activities of the FBI, as well as the guidelines and standards used by the FBI in arriving at its opinion and the grounds therefor; and

(d) provide to Archives a written description of each of the 214 investigation classifications including the total number of existing files in each category at FBI headquarters, field offices, and liaison offices.

(e) The officials designated pursuant to paragraph 1 herein shall, by July 10, 1981, file affidavits with the Court concerning the implementation of the requirements of this paragraph.

3. Archives shall

(a) forthwith select and designate impartial, qualified archivists, appraisers, and historians, including those who are familiar with the historical context in which the documents are generated, who are conversant with current and expected demands for documents, and who understand the FBI's method of operation and its system of keeping records, and file with the Court the names of such persons and their qualifications. To the extent that employees of Archives may be expected to be unable to perform the responsibilities required under this Order and the previous orders of the Court, Archives shall employ independent consultants to carry out these responsibilities;

(b) forthwith draw up standards, criteria and guidelines to be used in the examination of the files and records of the FBI for determining which files and records by identifiable category and classification will be preserved in accordance with law and the orders of this Court. A copy of these standards, criteria, and guidelines shall be filed with the Court not later than July 20, 1981;

(c) submit to the Court not later than July 6, 1981, its detailed explanation for the methodology used to provide for the examination by its personnel of relatively large number of files which are unlikely to have permanent or research value while under that same methodology records which probably have such value will remain largely unexamined;

(d) review the "00" sections of each of the 214 classifications of investigative files and such other records in the possession of the FBI as may be appropriate and determine (i) which classifications and categories or portions thereof appear to have historical, administrative, legal, research, evidentiary or other value requiring them to be preserved in toto; (ii) which classifications and categories or portions thereof may be preserved on a more selective

basis, and (iii) which classifications and categories or portions thereof may be expected to be found to lack any historical or other value. Archives shall file with the Court a report setting forth such information and the basis upon which the conclusions were reached not later than July 20, 1981.

4. On or before September 28, 1981, Archives shall submit a recommended retention plan to the FBI.

5. On or before October 16, 1981, the FBI shall submit to Archives a records disposition schedule based on the Archives retention plan.

6. On or before November 9, 1981, the FBI and Archives shall file with the Court the detailed record retention plans and disposition schedules encompassing both headquarters and field office files based upon appraisals as directed by order of this Court and formulated in accordance with the standards outlined in the opinion of January 10, 1980; together with a report setting forth the factual basis and reasons for the judgments and proposals set forth in such report. Plaintiffs will thereafter have an opportunity to file with the Court their views on the adequacy of the plans and schedules under the law.

7. On the first day of each month until the submission of the final report, the FBI and Archives shall file a report of progress on the work completed and to be completed to comply with this Court's orders and of the number of personnel of FBI and Archives assigned to perform the work necessary to comply with the Court's order.

8. In the absence of a stay issued by a court of competent jurisdiction, all directives of this order and previous orders of this Court shall be complied with notwithstanding the pendency or contemplation of motions to modify any of the orders heretofore issued by this Court.

9. Plaintiffs may file an application for an award of attorneys' fees and costs, including points and authorities in support thereof, on or before July 6, 1981. Defendants shall file their opposition, if any, on or before July 27, 1981, and

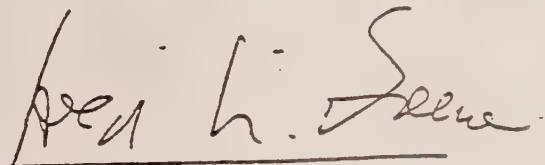
the Court will determine thereafter whether such fees and costs ~~will be allowed~~ and the amount thereof.

10. Plaintiffs and defendants shall show cause by June 19, 1981, why the January 10, 1980 preliminary injunction, as amended by subsequent orders of this Court, should not be made permanent.

11. The government's February 24, 1981 motion for clarification or, in the alternative, modification shall be and it is hereby denied with respect to tax returns and tax return information.

12. The Archives shall file affidavits specifying the extent to which it may now be in possession of or have had the opportunity to review grand jury material or material under Title III of the Omnibus Crime Control and Safe Streets Act of 1968 as a consequence of receiving it from government agencies other than the FBI and the circumstances of such possession and review; and the FBI shall file affidavits specifying the means by which it has come to possess grand jury data and materials under court seal, the volume of such materials, and the extent to such materials are or may be segregated from other FBI files. No records in any of these categories shall be disposed of without further order of this Court.

13. The government's March 23, 1981 motion for clarification or, in the alternative, modification shall be and it is hereby granted with respect to Privacy Act expungements and seized or donated perishable items and physical evidence, and it shall be and it is hereby denied with respect to informants' names and seized or donated documentary evidence.


Harold H. Greene
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN FRIENDS SERVICE
COMMITTEE, et al.,

Plaintiffs,

-v.-

WILLIAM W. WEBSTER, et al.,

Defendants.

Civil Action No. 79-1655

FILED

JUL 1 - 1981

ORDER

AMES E. DAVEY, CLERK

Upon consideration of the parties' responses to the order to show cause why the preliminary injunction should not be made permanent and defendants' motion to reconsider and vacate the June 9, 1981 order, and for various stays, it appearing that in view of defendants' recalcitrance in complying with previous orders of the Court, their request for a dissolution of the preliminary injunction and for a judgment in their favor is frivolous; and it appearing that defendants are entitled without delay to a stay of certain substantive portions of the order entered by this Court on June 9, 1981 pending further briefing; and it appearing that defendants have been subject to the injunction for the past eighteen months without taking an appeal, that the parties have adduced all the evidence they intend to offer, and that the case is ripe for final resolution, it is this 1st day of July, 1981,

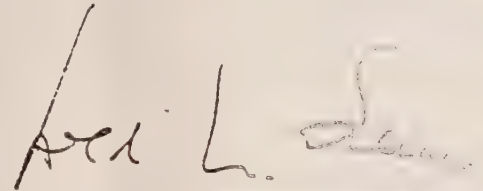
ORDERED That defendants' request for a dissolution of the preliminary injunction and for a judgment in their favor be and it is hereby denied, and it is further

ORDERED That the preliminary injunction of January 10, 1980, as amended subsequently, be and it is hereby made permanent, and it is further

ORDERED That the effectiveness of those portions of the Court's order of June 9, 1981 which mandated archival access to, and review of, tax returns, informants' names, and seized or

voluntarily contributed documentary material be and it is hereby stayed pending further order of the Court, but that all other portions of the order, including those precluding defendants from destroying, returning, or otherwise disposing of seized or voluntarily contributed documentary material, shall not be stayed, and it is further

ORDERED That all other pending matters will be decided by the Court after plaintiffs have had an opportunity to respond further to defendants' most recent pleadings.

A handwritten signature in dark ink, appearing to read "Harold H. Greene", is written over a horizontal line.

Harold H. Greene
United States District Judge

6/24/82

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS HOBSON, et al. :
Plaintiffs :
v. : Civil Action No. 76-1326
JERRY WILSON, et al. :
Defendants :

REPLY OF D.C. DEFENDANTS TO PLAINTIFFS' MEMORANDUM ON NEED
FOR INJUNCTIVE RELIEF

On May 31, 1982, this Court requested that the parties file brief memoranda concerning plaintiffs' claim for injunctive relief in the above captioned lawsuit. D.C. defendants filed their memorandum with the Court on June 15, 1982. Counsel for D.C. defendants received a copy of plaintiffs' memorandum on June 14, 1982. Although plaintiffs' memorandum is directed almost entirely towards the Federal defendants,^{*} a few words need be said in reply. A close look at the cases and arguments that plaintiffs muster in support of their contention that injunctive relief is appropriate, in fact, reinforce the position of D.C. defendants set forth in their memorandum to the Court. The plaintiffs have an adequate remedy at law and any issues regarding injunctive relief are moot vis à vis the D.C. defendants.

^{*}/Plaintiffs allude only to the possibility of continued Federal COINTELPRO programs or practices and not at all to the possibility of continued illegal practices or programs by D.C. defendants. See, Plaintiffs' Memorandum, ppl. 3 and 4. As such, it appears plaintiffs virtually concede the lack of any need for injunctive relief against D.C. defendants.

DAMAGE AWARDS ARE ADEQUATE REMEDY AT LAW

Plaintiffs assert that in the instant case the defendants violated their constitutional rights guaranteed by the First Amendment to the Constitution. For this reason alone, they assert that "their loss is irreparable as a matter of law and damages can never be adequate". Plaintiffs' Memorandum, page 2 (. emphasis supplied). However, no case cited by plaintiffs in their memorandum sets forth this extreme proposition. Additionally, plaintiffs mistate the law with respect to damages as an adequate remedy at law where First Amendment rights are involved.

The first case cited by plaintiffs in support of their position is International Association of Firefighters v. Sylacauga, 436 F. Supp. 482 (N.D. Ala. 1977). This case involves the city's violations of plaintiff's property interest in the promotional procedures for fire fighters set forth under state law. The plaintiffs, a fire fighters' union and union members, challenged, among other matters, the failure of defendants to promote officers in the fire department by competitive appointment and competitive exams. Unlike the case at bar, the plaintiffs in Sylacauga needed injunctive relief to force a change in defendant's practices so as to allow individual firefighters to compete for promotion. Thus, in Sylacauga, money damages would not have been adequate relief. Nowhere in the Sylacanga opinion does the Court state that damages can never be adequate where constitutional rights are involved.

The second case upon which plaintiff's inexplicably rely is Sampson v. Murray, 415 U.S. 61 (1974). Plaintiffs' reliance on Murray is clearly misplaced since the Supreme Court in Murray denied injunctive relief on grounds that alleged deprivation of plaintiff's rights could be compensated

for by subsequent reinstatement and back pay award. Thus, Murray actually supports defendants' position.

The third case cited by plaintiffs in support of their assertion that damages are not an adequate remedy at law is Lankford v. Gelston, 364 F.2d 197, 202 (4th Cir. 1966). The Lankford case involves massive police violations of the Fourth Amendment rights of the citizens of Baltimore, and, in particular, the Black Community. The police, in an attempt to apprehend a killer of a fellow officer, had engaged in 300 searches of houses over a period of 19 days based solely on uncorroborated anonymous tips. The court felt the plaintiffs' case warranted injunctive relief for three reasons, none of which are applicable to D.C. defendants. First, the court observed that this large scale violation of citizens rights at issue before the court also occurred routinely and was likely to reoccur in other instances where the police attempted to apprehend persons accused of serious crimes. Lankford, at 201. Second, the court held that money damages were inadequate in this instance because the personal assets of police officers were minimal and there would be no compensation available from public funds. Lankford, at 202. The court, however, nowhere stated that money damages can never be adequate where constitutional rights are involved. Third, the court expressed its concern that persons who were not ultimately accused of crimes would not ordinarily find appropriate recourse from the courts to redress unlawful police intrusions into their houses. None of these factors cited by the Lankford court are present in the instant case. As has been stated previously, the Metropolitan Police Department is no longer engaged in, and is unlikely to again engage in, the type of conduct which gave rise to this lawsuit. D.C. Defendants Memorandum, p.2. Additionally, plaintiffs who can

did the court find evidence of clear change of policy, and a demonstration that there was little likelihood of reoccurrence of the complained about wrongful activities. As such, these cases are not applicable to D.C. defendants. D.C. defendants have presented clear evidence, undisputed by plaintiffs, both of change of policy and that there is little likelihood of any reoccurrence of the alleged wrongful act.

The first case cited by plaintiffs on the mootness issue is Allee v. Madrano, 416 U.S. 802 (1973). This case, however, has nothing to do with officials "repenting" or changing their policy, contrary to the suggestion in plaintiffs' memorandum. The case is a class action lawsuit brought by named plaintiffs and the United Farm Workers Organizing Committee who, among other matters, sought injunctive relief against various law enforcement groups and a Justice of the Peace. In Allee, the defendants' use of persistent illegal police activities, including physical abuse and terror tactics, had crushed and continued to chill the efforts of the union to organize. The court refused to find the issues moot and granted plaintiffs' request for an injunction. The court stated that without an injunction, the plaintiffs would have been without any means to legally exercise their First Amendment rights of free speech, assembly, and association, because the illegal police activities were likely to reoccur. Allee, at 804-05, 807, 809-11, 814-15. The facts in Allee are unlike these in the instant case. Plaintiffs in Hobson do not claim that the D.C. defendants now engage, or ever engaged, in terror tactics or physical abuse. They also do not claim that their present efforts to organize and/or speak out on issues is chilled now or will be chilled in the future by any actions of the D.C. defendants. Additionally, the D.C. defendants have long since ceased the alleged wrongful acts about which plaintiffs complained, including changing

the official policy towards information-gathering on groups.

The second case cited by plaintiffs on the issue of mootness is Rowley v. Goodman, 502 F.2d 1326 (4th Cir. 1976). The plaintiffs in Rowley alleged they were denied admission to, were ejected from, and/or arrested at a rally honoring Billy Graham which was attended by the President of the U.S. They claimed they were singled out for this treatment by the F.B.I. and Secret Service because of their opposition to the Vietnam War and their other activities in support of the peace movement. The Court refused to find the issue moot because it was foreseeable that the F.B.I. and Secret Service would engage in the same kinds of actions against the plaintiffs in the future at another rally or event attended by the President. The lynchpin of the Rowley Court's holding was the likelihood of reoccurrence of the injury. The court found no indication of any change of policy by those protecting the President when he attended public rallies.

The third case cited by plaintiffs is Berlin Democratic Club v. Rumsfeld, 410 F. Supp. 144 (1976) (hereinafter "BDC"). The plaintiffs ~~were American citizens and organizations and one Austrian citizen, residing in West Berlin or West Germany.~~ They alleged that the U.S. Army engaged in various intelligence operations against them because of their political activities including supporting Senator McCarthy for president in 1972 and supporting efforts to impeach former President Nixon in 1973. BDC, at 147. The intelligence activities about which they complained included warrantless electronic surveillance, cover infiltration of their meetings, blacklists, and maintenance and distribution of "dissidence identification" file. The defendants contended that the case was moot because of the issuance of two army regulations. However, the court disagreed. It observed that one of the regulations did not cover some of the conduct about which plaintiffs complained,

i.e., the use of wiretaps without prior judicial authorization.

Secondly, the court stated it was not willing to accept at face value defendants' assertions that certain illegal activity, prohibited under the second regulation, had ceased. The court gave three reasons for its disbelief of defendants' assertions that policy had changed, none of which are applicable in the Hobson case. First, the defendants already had made prior misrepresentations to the court about their conduct. Second, despite the promulgation of the regulations, the Army had since undertaken at least some actions similar to that about which plaintiffs were complaining. Third, the defendants had already engaged in such a pervasive and long-standing pattern of allegedly illegal activity that the court required more than self-serving statement by defendants to find that their activity would not continue in the future. BDC, at 153. In sum, the court in BDC would not find mootness because it did find any clear evidence of official change of policy.

The fourth case plaintiffs cite in support of their position is Lankford v. Goelsfon, supra. This case has already been discussed above. As was pointed out in that discussion, the court believed there was a likelihood of the reoccurrence of the illegal activity, if not on such a massive scale, at least in the more routine attempts by police to apprehend persons they viewed as guilty of serious criminal behavior. In short, the court saw no clear evidence of a change in police activity. Additionally, that case, as discussed above, also turned ^{and} the court's view that the plaintiffs had no adequate remedy at law.

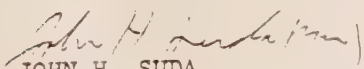
The last case cited by plaintiffs in support of their position is Campbell v. McGruder, 580 F.2d (D.C. Cir. 1978). Campbell v. McGruder was discussed in detail in the initial

memorandum submitted by D.C. defendants. The facts in Campbell v. McGruder clearly illustrate the kind of facts which should be before a court to justify injunctive relief. As already discussed, these kinds of facts are not present in the instant case. In Campbell v. McGruder, the plaintiffs complained about various long-standing "flagrant and shocking" conditions in the District jail. The court noted that many of these conditions would remain unacceptable in the future. Campbell v. McGruder, at 541. Additionally, defendant agreed there was a strong possibility that poor conditions would continue in the future. Campbell v. McGruder, at 541-42.

Conclusion

In sum, plaintiffs in the case at bar are asking this Court to issue injunctive relief against the D.C. defendants without giving the Court one iota of proof that there is a likelihood of reoccurrence of injury. In every case the plaintiffs cited on the issue of mootness, the courts observed that there was a strong likelihood of the reoccurrence of deliberate wrongdoing in the future based on facts peculiar to those cases. In the instant case, there is no suggestion, much less any proof, of such a likelihood. Accordingly, the issues before this Court with respect to the D.C. defendants is moot and injunctive relief would be inappropriate.


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply of D.C. Defendants to Plaintiffs' Memorandum on Need for Injunctive Relief was mailed, postage prepaid, to David H. White, Esquire, Department of Justice, 10th and Pennsylvania Avenue, N.W., Washington, D.C. 20530, Attorney for F.B.I.; and to Anne Pilsbury, Esquire, 17 Danforth Street, Norway, Maine 04268, this 22nd day of June, 1982.

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6/21/92

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS HOBSON, et al.,)	
Plaintiffs)	
v.)	Civil Action No. 76-1326
JERRY WILSON, et al.,)	
Defendants)	

MOTION BY PLAINTIFFS FOR HEARING ON ISSUE
OF CURRENT FBI PRACTICES AS THEY RELATE TO NEED
FOR INJUNCTIVE RELIEF

The plaintiffs hereby move the Court to hold a hearing prior to ruling on the pending prayer for injunctive relief so that all parties may present evidence and be heard on the issue of the need for injunctive relief in reference to the current practices of the defendants toward domestic political groups and persons engaged in First Amendment activity.

As stated in more detail in the attached memorandum, recent remarks by the Director of the Federal Bureau of Investigation, defendant William H. Webster, suggest that the FBI is contemplating the resumption of COINTELPRO-type practices.

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COUNSEL FOR PLAINTIFFS

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS HOBSON, et al.,)	
)	
Plaintiffs)	
)	
v.)	Civil Action No. 76-1326
)	
JERRY WILSON, et al.,)	
)	
Defendants)	
)	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT
OF PLAINTIFFS' MOTION FOR A HEARING ON INJUNCTIVE RELIEF

Certain recent public statements by defendant William H. Webster, Director of the Federal Bureau of Investigation, raise a serious question about the accuracy of the position that has been taken by the federal defendants throughout this litigation, viz. that COINTELPRO-type activities are a thing of the past and will not be resumed by the FBI.

If the statements attributed to defendant Webster by the attached article in The New York Times are accurate, they indicate that the FBI is drawing away from the 1976 guidelines promulgated by then Attorney-General Levy. These guidelines were adopted as a remedial response to COINTELPRO and were designed to prevent such tactics from being used in the future. The attached article also indicates a belief on the part of defendant Webster that countermeasures by the FBI are contemplated not just against "terrorists" but against groups and persons engaging in "propaganda" and "disinformation" as well as in giving legal advice. Clearly some inquiry is called for into just what these terms mean to the FBI especially since the examples given in the article of possible target groups include the very type of lawful peaceful groups that were targeted under COINTELPRO (eg. the Socialist Workers Party and the National Lawyers Guild).

As the FBI defendants pointed out in their memorandum on the issue of injunctive relief, defendant Webster has not yet testified in this case and has never had an opportunity to respond to the plaintiffs' concerns about the need for a prophylactic injunction. (See Memorandum by Defendant William H. Webster in Response to Court's Order of May 31, 1982 Regarding Prayer for Equitable Relief, page 1). Given the gravity of the issues involved here, it is appropriate to give all parties an opportunity to address the question of just what are current FBI practices in regard to domestic political protest groups.

Accordingly, the plaintiffs have moved the Court to order a brief evidentiary hearing on the issue of current FBI practices.

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COUNSEL FOR PLAINTIFFS

CERTIFICATE OF SERVICE

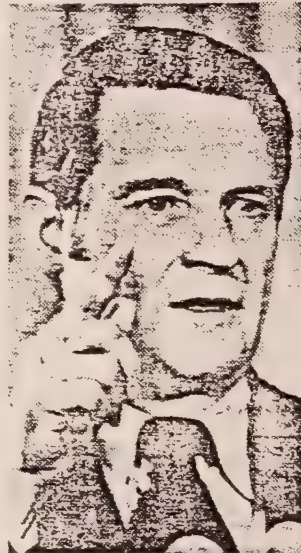
I hereby certify that I have mailed, postage prepaid, this 25th day of June, 1982, a copy of the foregoing Motion for Hearing on Issue of Current FBI Practices, Memorandum of Points and Authorities, Attachment, and Proposed Order to David H. White, Attorney, Dept. of Justice, 10th & Penna. Ave. N.W., Washington, D.C. 20530 and to George Barclay, Assistant Corporation Counsel, District Building, 14th & E Sts. N.W., Washington, D.C. 20004.

Anne Pillsbury
ANNE PILSBURY

ATTACHMENT TO PLAINTIFFS' MOTION FOR A HEARING

S. FRIDAY, JUNE 25, 1982

NEW YORK TIMES JUNE 25, 1982



United Press International

William H. Webster

Rules on F.B.I.'s Surveillance Of Political Groups to Change

WASHINGTON, June 24 (UPI) — Guidelines restricting spying on domestic political organizations by the Federal Bureau of Investigation are about to be eased to let it keep an eye on "terrorist" groups, the director, William H. Webster, told Congress today.

Mr. Webster told the Senate Subcommittee on Security and Terrorism that the revised rules being worked out with the Justice Department would not violate constitutional guarantees of free speech and political dissent.

The guidelines, issued in 1976, have come under attack for preventing the bureau from infiltrating subversive organizations.

Mr. Webster said he expected the revised rules "within weeks." He did not go into details, but told Senator John P. East, Republican of North Carolina, a conservative, "I think you will be pretty much pleased."

'Duty to Protect Public'

Mr. Webster said the original guidelines dealt with the bureau's domestic security investigations and "the duty to protect the public against political and racial terrorism and against those who would destroy our political system through criminal violence."

He said care must be taken that in-

vestigations "do not spill over into areas of legitimate political dissent." The 1976 rules, he said, were an attempt to strike a "delicate balance."

The rules were "properly designed to prevent spying on essentially political organizations," he said, but made it especially difficult to penetrate other groups.

He said new rules would be aimed at "terrorist groups" that are "no different from other criminal enterprises."

Senator Jeremiah Denton, an Alabama Republican, head of the subcommittee, cited, among others, the Socialist Workers Party, the Progressive Labor Party, the Weather Underground Organization and the May 19 Communist Organization as groups that "favor the overthrow of the Government of the United States by force and violence."

He also cited the National Lawyers Guild as an organization that "seeks to exploit the law in order to bring about revolutionary change."

6/28/92

Civil Action No. 76-1326

543

Rules on F.B.I.'s Surveillance Of Political Groups to Change

WASHINGTON, June 24 (UPI) — Guidelines restricting spying on domestic political organizations by the Federal Bureau of Investigation are about to be eased to let it keep an eye on "terrorist" groups, the director, William H. Webster, told Congress today.

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'Duty to Protect Public'

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vestigations "do not spill over into areas of legitimate political dissent." The 1978 rules, he said, were an attempt to strike a "delicate balance."

The rules were "properly designed to prevent spying on essentially political organizations," he said, but made it especially difficult to penetrate other groups.

He said new rules would be aimed at "terrorist groups" that are "no different from other criminal enterprises, except that their motivation may be political rather than financial."

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He also cited the National Lawyers Guild as an organization that "seeks to exploit the law in order to bring about revolutionary change."

Mr. Webster said groups that "produce propaganda, disinformation and 'legal assistance' may be even more dangerous than those who actually throw the bones."



United Press International

William H. Webster

ings of \$513 million would be achieved by recovery of overpayments, pro-rating the first month's benefits on the basis of when the application was made and determining disability on a prognosis of at least a 24-month duration.

6/1/82

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS HOBSON, et al.)
)
Plaintiff)
)
vs)
)
JERRY WILSON, et al.,)
)
Defendants)
_____)

Civil Action No. 76-1326

PLAINTIFFS' MEMORANDUM ON NEED FOR INJUNCTIVE RELIEF TO
PROHIBIT FUTURE MISCONDUCT BY THE FBI OR DISTRICT OF COLUMBIA

The plaintiffs seek two forms of injunctive relief; an order prohibiting the reinstatement or resumption of any of the programs or practices known as COINTELPRO-NEW LEFT or COINTELPRO-BLACK NATIONALIST described in plaintiffs' exhibits 1 through 3, and an order directing that all FBI files on or about the plaintiffs, including the Washington Area Women Strike for Peace, be turned over to the plaintiffs and any copies in the possession of the FBI destroyed.^{1/}

The Court has asked the parties to address the issues of whether there is still a need for injunctive relief to prohibit future attempts to thwart the plaintiffs' First Amendment rights in light of the FBI's voluntary cessation in 1971 of its domestic counterintelligence programs and also in light of the money damages already awarded.

I

THE DAMAGES AWARDED THE PLAINTIFFS REDRESS
PAST INJURIES BUT DO NOT GUARANTEE THE
PLAINTIFFS' RIGHTS OF FREE SPEECH, ASSEMBLY
AND ASSOCIATION AGAINST FUTURE ATTACK BY
THE DEFENDANTS OR THEIR SUCCESSORS

It is axiomatic that injunctive relief is available only if there is no adequate remedy at law. To suggest that because damages were awarded in this case for past constitutional violations, that future violations could

^{1/} The plaintiffs are accepting the bona fides of the persistent representations of the District of Columbia defendants throughout this litigation that all D.C. political intelligence files pertaining to the plaintiffs have been destroyed.

also be remedied by monetary awards is to assume that the plaintiffs are willing, for a price, to bargain away their First Amendment rights. They are not. There is no amount of money for which the plaintiffs would be willing to have FBI and D.C. police informants again attend their meetings with an eye to possibilities for disruption or to become again subject to intrusive and intimidating surveillance techniques.

Because the rights at stake are paramount constitutional rights, their loss is irreparable as a matter of law and damages can never be adequate. International Association of Firefighters v Sylacagua, 436 F. Supp. 482 (N.D. Ala. 1977), citing Sampson v Murray, 415 U.S. 61 (1974); Lankford v Gelston, 364 F.2d 197, 202 (4th Cir. 1966).

II

WHERE AS HERE THERE WAS A WIDESPREAD PATTERN OF CONSTITUTIONAL VIOLATIONS, INJUNCTIVE RELIEF IS APPROPRIATE EVEN IF THE GOVERNMENT OFFICIALS CLAIM TO HAVE STOPPED THE OFFENDING CONDUCT.

The defendants' efforts to impede the plaintiffs in their exercise of First Amendment rights were carried out in bald disregard for the Constitution and without any legitimate law enforcement purpose. The Court should not hesitate to restrain permanently such conduct. Where First Amendment rights are involved, the courts have not hesitated to enter injunctions even in the face of official repentance and change of policy. See Allee v Madrano, 416 U.S. 802 (1974) upholding an injunction against a recurrence of police misconduct toward striking Texas farmworkers; Rowley v McMillan, 502 F.2d 1326 (4th Cir. 1974), ordering an injunction against any future attempt to bar potential protestors from mass gatherings which the President attended in North Carolina even though the event giving rise to the complaint, a rally honoring Rev. Billy Graham, was arguably a one-shot incident; Berlin Democratic Club v Rumsfeld, 410 F. Supp. 144 (D.C. D. 1976), holding injunctive relief appropriate against obtrusive surveillance even where officials state it has ceased; and Lankford v Gelston, 364 F.2d 197 (4th Cir. 1966) noting that in cases of flagrant police disregard for constitutional

safeguards the courts have a "strong obligation" to restrain the police against repeating the offense. Id. 203

Lankford is especially instructive to the instant case. In Lankford the police had carried out warrantless, abusive house-to-house searches of black homes looking for a criminal suspect, disregarding the Fourth Amendment rights of a number of black householders. By the time the case reached the appellate court, the original police chief defendant had been replaced by a new chief who disassociated himself from the racially insensitive practices of his predecessor. Nevertheless, the Court held the injunction could and should run against the new chief and would be binding on all future office holders pursuant to Fed. R. Civ.P.25 (d) since the injunction spoke not so much to a named individual as to police department policy. Id. at 205, n.9.

In Campbell v McGruder, 580 F.2d 521 (D.C. Cir. 1978), this circuit affirmed the principle that injunctive relief is appropriate to assure constitutional rights even if the defendants have stopped the complained of practice.

It is the duty of the court to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is a probability of resumption.

Id. 541, citing U.S. v Oregon State Medical Society, 343 U.S. 326, 333 (1952).

The evidence at trial showed that the FBI abandoned COINTELPRO not out of concern for civil rights but because the program had become public and the Bureau had been embarrassed. The logical inference from reading Exhibit 36 is that but for public disclosure the FBI would have continued COINTELPRO. In these circumstances, injunctive relief is not just a precautionary measure.

Furthermore, there is a real question as to whether all COINTELPRO activities have in fact ended. The memo of April 28, 1971 terminating the program allows COINTELPRO actions in "exceptional instances" (not specified) ^{as} and so long/there are "tight procedures to insure absolute security." in

other words COINTELPRO actions after April, 1971 are to be fewer and more secret but they are not abandoned.

President Reagan's comprehensive Executive Order No. 12333 on intelligence activities, issued on December 4, 1981 in the midst of the trial in this case, makes no effort to prohibit COINTELPRO activities and specifically authorizes the infiltration of domestic political groups by the FBI as long as such "participation" is "essential to achieving lawful purposes as determined by the agency head or designee." The "participation" can extend to "influencing the activity of the organization or its members" if undertaken on "behalf of the FBI in the course of a lawful intelligence investigation". (E.O. 12333 is attached hereto). Nowhere in the Executive Order are these broad terms defined. Agency heads are directed to issue implementing guidelines but these have either not been issued or have not been made public. Since COINTELPRO was specifically authorized by an agency head and was presumably felt to be a "lawful purpose" of the FBI at the time, the use of the term "lawful" in Executive Order 12333 provides the plaintiffs no real assurances. (See §2.9, Part 2).

The possibility of continued COINTELPRO activities, no matter how remote, combines with the gravity of the past offenses to require injunctive relief. The Court "may be properly concerned not only with the open and formal implementation of agreements exactly like those entered into in the past, but also with the possibility the past unlawful conduct will be perpetuated in some more subtle form in the future." Rubbermaid, Inc. v F.T.C., 575 F.2d 1169, 1172 (6th Cir. 1978).

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Injunction
denied

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS HOBSON, et al.,)
)
Plaintiffs,)
)
v.) Civil Action No. 76-132)
)
JERRY WILSON, et al.,)
)
Defendants.)
)
)

FILED

JUL 22 1982

MEMORANDUM

JAMES F. DAVEY, Clerk

The disposition of the parties' motions for a directed verdict or new trial leaves for consideration plaintiffs' prayer for injunctive relief. The amended complaint filed on October 28, 1977, sought, in addition to damages, an injunction requiring defendants to deliver to plaintiffs copies of "any and all files of a non-criminal nature on the plaintiffs' political activities, affiliations, and beliefs," and requiring defendants to destroy all other copies of those files. At trial on the damages claims in December 1981 and again in pleadings filed in May and June of 1982, plaintiffs broadened their claims for injunctive relief to include an injunction restraining defendants from activities, similar to COINTELPRO-New Left and COINTELPRO-Black Nationalist, that would violate plaintiffs' civil rights under the Constitution. At trial in December 1981, plaintiffs had a full opportunity to adduce evidence of any past or threatened conduct impinging on their constitutional rights.^{1/} The matter is now

^{1/} On June 28, 1982, plaintiffs moved for "a hearing prior to ruling on the pending prayer for injunctive relief so that all parties may present evidence and be heard on the issue of the need for injunctive relief in reference to the current practices of the defendants toward domestic political groups and persons engaged in First Amendment activities." Motion for Hearing on Issue of Current FBI Practices (filed June 28, 1982). The motion is opposed by all defendants. The proffer pointedly omits any reference to plaintiffs themselves, or to any activity of plaintiffs. This is not a class action, and the motion accordingly will be denied.

before the Court on plaintiffs' recently-filed application for relief and defendants' opposition. Based upon those papers and the record of trial on the damages claims, the Court makes the following findings of fact and draws the following conclusions of law.

Findings of Fact

1. On December 23, 1981, a jury of six returned verdicts in favor of eight plaintiffs and against thirteen defendants on claims that defendants had violated plaintiffs' First Amendment rights in connection with COINTELPRO-New Left, COINTELPRO-Black Nationalist, and separate related activities of the Intelligence Division of the Metropolitan Police Department ("MPD"). See Hobson v. Wilson, Civil Action No. 76-1326 (D.D.C., June 1, 1982).^{2/}

2. The total monetary liability of the defendants found liable to the prevailing plaintiffs by the jury is \$684,437.50. Individual defendants' liability to all plaintiffs ranges from \$75,000 to \$9,375. The District of Columbia government was found liable to each prevailing plaintiff for \$37,973.50. Under terms of an Order of June 1, 1982, striking certain awards of punitive damages, five defendants remain liable to each prevailing plaintiff for various sums of punitive damages. Both the compensatory and the punitive damage awards will have a deterrent effect on defendants and on others with similar responsibilities

^{2/} The recent decision of the Supreme Court in NAACP v. Claiborne Hardware Co., 50 U.S.L.W. 5122, 5133 (U.S., July 2, 1982), reversing a bench verdict by a state trial court does not require re-examination of the jury verdict in this case. See Adickes v. S. H. Kress & Co., 398 U.S. 144, 175-88 (1970) (Black, J., concurring in the judgment); see also Hampton v. Hanrahan, 600 F.2d 600 (7th Cir. 1979), cert. denied on these grounds, rev'd in part on other grounds, 100 U.S. 1987 (1980). Nor does the Supreme Court's decision in Harlow v. Fitzgerald, No. 80-945 (June 24, 1982), slip op. at 17-18, materially affect the instructions about official immunity which were given to the jury in this case in reliance on Procunier v. Navarette, 434 U.S. 555 (1978), Wood v. Strickland, 420 U.S. 308 (1975), and Pierson v. Ray, 386 U.S. 547 (1967).

in the FBI and MPD.

3. At trial on the damages claims there was uncontradicted evidence that COINTELPRO-New Left and COINTELPRO-Black Nationalist, as well as the non-criminal investigative activities of the MPD Intelligence Division of which plaintiffs complained, were discontinued by 1975. The FBI defendants against whom the jury rendered verdicts are now retired.

4. There is no evidence that any defendant or co-conspirator has instigated or resumed any plan or design to interfere with plaintiffs' participation in political or social assembly, association, or expression, or to violate plaintiffs' Fourth Amendment rights.

5. In the course of discovery in this action and through requests for information under the Freedom of Information Act, 5 U.S.C. § 552, plaintiffs obtained copies of all accessible non-privileged materials the Federal Bureau of Investigation held in its non-criminal investigative files regarding them and pertinent to their present claims. Any files having similar content once in the custody of the MPD and not produced during discovery have been destroyed or are no longer accessible.^{3/}

6. Defendant Webster, the incumbent Director of the FBI, was not even associated with the FBI during the period which was considered by the jury in the damage trial, and there is no evidence or proffer of any evidence of any act by him that was either unlawful or that threatened actionable injury to any plaintiff.

Conclusions of Law

1. The Court has jurisdiction to consider plaintiffs'

^{3/} In the fall of 1981, counsel for the District of Columbia reported to the Court, in response to plaintiffs' discovery requests, that the District's records index was so incomplete that the District could not locate any documents in addition to those produced. Plaintiffs do not now challenge the bona fides of defendant's effort to locate documents.

claims for injunctive relief against threatened violations of their constitutional rights. 28 U.S.C. § 1331. Plaintiffs are entitled to leave to amend their complaint for an injunction respecting possible interference with their First Amendment or Fourth Amendment rights. Fed.R.Civ.P. 15(b). The Court deems their complaint so amended by statements on the record and by the letter of plaintiffs' counsel to the Court filed in this action on May 14, 1982.

2. The standard for injunctive relief in federal jurisdiction "has always been irreparable injury and the inadequacy of legal remedies." Weinberger v. Romero-Barcelo, 102 S.Ct. 1798, 1803 (1982). The award of damages in this case not only provided plaintiffs a remedy for past wrongs, but also has a recognized deterrent effect that adequately protects them against future injury by any of the defendants. Cf. City of Newport v. Fact Concerts, Inc., 101 S.Ct. 2748, 2761 (1981); Owen v. City of Independence, 101 S.Ct. 1398, 1416 (1980).

3. In the absence of express statutory authorization for affirmative relief, civil remedies against possible violation of the criminal law are seldom available. See generally Developments in the Law--Injunctions, 78 Harv. L.R. 994, 1013-16 (1965). Systematic or episodic violation of First and Fourth Amendment rights is denounced by 18 U.S.C. § 241. See also 18 U.S.C. § 242. The existence of criminal sanctions as possible restraints against violation of plaintiffs' constitutional rights therefore also weighs against injunctive relief. See also 18 U.S.C. § 2520; 23 D.C.Code § 554 (civil actions in damages for victims of unlawful electronic surveillance).

4. Extraordinary anticipatory relief of the character sought by plaintiffs cannot be obtained from a federal court to restrain law-enforcement activities of the Executive Branch based on "the mere possibility of future official misconduct." Reporters Comm. for Freedom of the Press v. American Telephone &

Telegraph Co., 192 U.S. App.D.C. 376, 410-11, 593 F.2d 1030, 1064-65 (1978), cert. denied, 440 U.S. 949 (1979). As the Court of Appeals observed in Reporters Committee v. AT&T:

The balance between the Executive and Judicial branches would be profoundly upset if the Judiciary assumed superintendence over the law enforcement activities of the Executive branch upon nothing more than a vague fear or suspicion that its officers will be unfaithful to their oaths or unequal to their responsibility.

192 U.S.App.D.C. at 411, 593 F.2d at 1065. Applied to this case, the standard for injunctive relief associated with Reporters Committee v. AT&T precludes the restraints plaintiffs now seek. See also Socialist Workers Party v. Attorney General, 419 U.S. 1314 (1974) (Marshall, J., as circuit justice in Chambers); Laird v. Tatum, 408 U.S. 1, 15 (1972).^{4/}

a. Plaintiffs have not proved or proffered that any defendant threatens their particular constitutional or statutory rights. Cf. Campbell v. McGruder, 188 U.S.App.D.C. 258, 580 F.2d 521 (1978); Lankford v. Gelston, 364 F.2d 197 (4th Cir. 1966).

b. Plaintiffs' theory of prospective injury is fatally vague and does not provide a basis for a judicially manageable decree. Cf. Rizzo v. Goode, 423 U.S. 362 (1976). There is no

^{4/} Plaintiffs recently proffered E.O. 12333 (Dec. 4, 1981) and the remarks of defendant Webster to a Senate Committee concerned with domestic security guidelines as general evidence of official authorization or toleration of possible law-enforcement abuses. See Statement of W.H. Webster before the Subcomm. on Security and Terrorism, U. S. Senate (Dep't of Justice release dated June 24, 1982) (filed July 8, 1982). According to plaintiffs, defendant Webster, in a statement to the Subcommittee quoted in the press, stated in response to questions from Members that in his view persons who "produce propaganda, disinformation and 'legal assistance' may be even more dangerous than those who actually throw the bombs." See N.Y. Times, June 25, 1982, at B14 col. 5 (filed June 30, 1982). Plaintiffs' proffer fails to present the precise context of the statement. Read in the context of his prepared statement, however, defendant's remark provides no basis for the relief plaintiffs seek. See Statement of W.H. Webster, loc.cit. at 5. See generally Reporters Comm. for Freedom of the Press v. American Telephone & Telegraph Co., 192 U.S.App.D.C. 376, 593 F.2d 1030 (1978); Berlin Democratic Club v. Rumsfeld, 410 F.Supp. 144 (1976).

live controversy between plaintiffs and any defendant, including defendant Webster, respecting the scope of plaintiffs' constitutional rights. See United Public Workers v. Mitchell, 330 U.S. 75 (1947).

c. Even if plaintiffs could demonstrate any probability of irreparable harm, plaintiffs could not obtain an injunction as a matter of right. Yakus v. United States, 321 U.S. 414 (1944). "Flexibility rather than rigidity" must govern resolution of a claim for injunctive relief against public officers. Cf. Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944). In a case such as this, where plaintiffs have obtained large damage awards having presumptively substantial deterrent impact on possible future activities of all defendants, and have not articulated any particular harm to which a decree should be addressed, considerations of the public interest preclude injunctive relief. See generally Weinberger v. Romero-Barcelo, supra; cf. TVA v. Hill, 437 U.S. 153 (1978); Railroad Com'n v. Pullman Co., 312 U.S. 496, 500 (1941).

5. Finally, plaintiffs petition for an order requiring destruction of files about them in defendants' custody. American Friends Serv. Comm. v. Webster, Civil Action No. 79-1655 (D.D.C., July 1, 1981) (H. Greene, J.) precludes destruction of the files plaintiffs seek to have destroyed. Plaintiffs' claims in this respect do not justify any attempt by this Court to create collateral exceptions to the Order in American Friends. Moreover, Congress, in the Privacy Act, 5 U.S.C. § 522a, has provided an adequate remedy at law to protect the interests of plaintiffs in the security and confidentiality of files in the possession of federal agencies.

As to the FBI defendants, plaintiffs have previously obtained copies of the non-criminal files regarding their activities in its possession, edited or redacted to reflect various privileges claimed by the Bureau. The "nice adjustment

and reconciliation" between competing interests essential to injunctive relief^{5/} would require the Court to recognize, when appropriate, the privileges the Bureau would invoke. Cf. 5 U.S.C. § 522(b)(1),(3),(6),(7). Disputes between plaintiffs and the Bureau regarding the precise scope of the privileges the Bureau could claim were resolved in the discovery phase of this litigation as the documents were produced for plaintiffs. Other materials were produced in administrative proceedings under FOIA that apparently were never appealed to the district court. This is not a FOIA action. Plaintiffs' prayer for release of documents by the Bureau has thus been rendered moot by completion of discovery and FOIA processing.^{6/}

An appropriate Order accompanies this Memorandum.^{7/}

Date:

July 22, 1982

Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

^{5/} Hecht Co. v. Bowles, supra, 321 U.S. at 329.

^{6/} As to the MPD, to whom neither FOIA nor the Privacy Act applies, see 5 U.S.C. § 551(1)(D), there is no evidence that the MPD any longer withholds the so-called "non-criminal" files on plaintiffs' activities generated by the Intelligence Division in the period before 1975.

^{7/} The accompanying Order also directs dismissal of all damages claims against the defendants remaining in this action against whom plaintiffs did not attempt to state claims in the December 1981 trial.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS HOBSON, et al.,

Plaintiffs,

v.

JERRY WILSON, et al.,

Defendants.

Civil Action No. 76-1326

FILED

JUL 22 1982

JAMES F. DAVEY, Clerk

ORDER

For the reasons stated in the accompanying Memorandum, it is this 22^d day of July 1982 hereby

ORDERED: that plaintiffs' prayer for injunctive relief be denied; and it is further

ORDERED: that judgment be entered for defendant Webster and all other defendants named in the amended complaint against whom the jury returned no verdict; and it is further

ORDERED: that the Clerk enter this judgment as final without awaiting a decision on plaintiffs' pending application for attorneys' fees.

Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

FILED

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AUG 26

JAMES F. DAVEY, Clerk

JULIUS HOBSON, et al.,)
)
Plaintiffs,)
)
v.) Civil Action No. 76-1326
)
JERRY WILSON, et al.,)
)
Defendants.)
)
_____)

ORDER

The Court has before it the Second Motion by defendants Brennan, Moore, Jones, Pangburn, and Grimaldi for Judgment Notwithstanding the Verdict or, in the Alternative, for New Trial, as well as a motion by the same defendants for Stay of Execution of Judgment pending disposition of the former motion. Upon consideration of defendants' memoranda and plaintiffs' opposition thereto, it is this 28th day of August, 1982, hereby

ORDERED: that the Second Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for New Trial on behalf of defendants Brennan, Moore, Jones, Pangburn and Grimaldi be DENIED in its entirety; and it is further

ADJUDGED AND ORDERED: that, in light of the disposition of defendants' Second Motion, their Motion for Stay of Execution is now moot and is therefore DENIED.

Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

(1)

JAMES E. JAMES, JR.
AND
THE DISTRICT OF COLUMBIA

THE DISTRICT OF COLUMBIA
PLANNING
AND
CONSTRUCTION
DIVISION

CITY OF WASHINGTON

The District of Columbia
Planning and Construction
Division is pleased to
announce the results of the
recently completed study
of the District's
planning and construction
division. The study was
conducted by the
District's Planning and
Construction Division
and the results are
presented in this report.
The study was conducted
in accordance with the
District's Planning and
Construction Division
policy and the results
are presented in this
report. The study was
conducted by the
District's Planning and
Construction Division
and the results are
presented in this report.

James E. James, Jr.
Director

